STATE OF MICHIGAN

IN THE

SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
SAWYER, P.J., K.F. KELLY AND FORT HOOD, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

ANDREW MAURICE RANDOLPH,

Defendant-Appellant.
_____/

Supreme Court
No. 153309

Court of Appeals
No. 321551

Circuit Court
No. 13-033003-FC

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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SUPPLEMENTAL STATEMENT OF QUESTIONS PRESENTED

I. (1) Does a court's finding that a defendant has failed to demonstrate plain error on appeal preclude a finding of ineffective assistance of trial counsel; and, (2) in particular, is the prejudice standard under the third prong of plain error, *People v Carines*, 460 Mich 750, 763–764 (1999) ("affecting substantial rights"), the same as the *Strickland* prejudice standard, *Strickland v Washington*, 466 US 668, 694 (1984) ("reasonable probability" of a different outcome)?

Defendant-Appellant: likely answers these questions, "No."

Plaintiff-Appellee: answers these questions,

"(1) A defendant's failure to demonstrate plain error does not necessarily preclude a finding of ineffective assistance of counsel, *but may* preclude such a finding depending on the ground(s) asserted; and (2) Yes, the prongs of each standard are the same, because they developed harmoniously from the same historical precedent. In this case, Defendant's failure to demonstrate prejudice under the third prong of the plain-error analysis ("affect substantial rights") necessarily precludes a finding of prejudice under *Strickland*'s prong ("reasonable probability" of a different outcome) premised on the same grounds, and thus precludes a finding of ineffective assistance of counsel."

The Court of Appeals: was not asked to answer these questions.

The trial court: was not asked to answer these questions.

SUPPLEMENTAL STATEMENT OF FACTS

The People incorporate by reference the Counter-Statement of Facts and Supplemental Counter-Statement of Facts in our initial Brief on Appeal and our Supplemental Brief on Appeal in the Court of Appeals, respectively, as well as the abbreviations and citations to the records cited therein.

Additional pertinent facts and procedural history may be discussed in the body of the People, Plaintiff-Appellee's, Supplemental Brief, *infra*, to the extent necessary to advise this Court fully as to the arguments raised on appeal.

SUPPLEMENTAL ARGUMENT

I. A court's finding that a defendant has failed to demonstrate plain error on appeal does not necessarily preclude, *but may* preclude a finding of ineffective assistance of trial counsel because the prejudice standard under the plain-error analysis of *People v Carines* and the prejudice standard under the ineffective-assistance-of-counsel analysis of *Strickland v Washington* are the same.

This Court has requested a supplemental brief "addressing: (1) whether a defendant's failure to demonstrate plain error precludes a finding of ineffective assistance of counsel; and, in particular, (2) whether the prejudice standard under the third prong of plain error, *People v Carines*, 460 Mich 750, 763–764 (1999) ('affecting substantial rights'), is the same as the *Strickland* prejudiced standard, *Strickland v Washington*, 466 US 668, 694 (1984) ('reasonable probability' of a different outcome)." *People v Randolph*, ___ Mich ___; 895 NW2d 181 (2017) (citations omitted). The short answer to the first question is that a defendant's failure to demonstrate plain error does not *necessarily* preclude a finding of ineffective assistance of counsel, *but may* preclude such a finding, depending on the ground(s) asserted. The short answer to the second question is, "Yes," the prongs of each standard are the same because they developed harmoniously from the same historical precedent. In this case, Defendant's failure to demonstrate prejudice under the third prong of the plain-error analysis ("affect substantial rights") necessarily precludes a finding of prejudice under *Strickland*'s prong ("reasonable probability" of a different outcome), and thus preclude a finding of ineffective assistance of counsel premised on the same grounds. Accordingly, leave should be denied and Defendant's convictions should be affirmed as the Court of Appeals applied these legal principles correctly.

a. Michigan's plain-error jurisprudence and ineffective-assistance-of-counsel jurisprudence find their roots—and their body—in the United States Supreme Court's development and application of these doctrines, and Michigan courts interpret and apply our state doctrines identically to the United States Supreme Court's interpretation and application of the respective federal doctrines.

Michigan's plain-error jurisprudence and ineffective-assistance-of-counsel jurisprudence find their roots—and their body—in the United States Supreme Court's development and application of these doctrines. Hence, it is necessary to understand the Supreme Court's historical development and current interpretation and application of these doctrines to understand Michigan's doctrines and how Michigan has adopted these doctrines within its jurisprudence.[1] The analysis reveals that the prejudice prong of the plain-error standard of review is the same as the prejudice prong of the ineffective-assistance-of-counsel standard of review because each prong is intertwined with and indistinguishable from the other. As Michigan courts' interpretation and application of our doctrines mirror the United States Supreme Court's interpretation and application of its doctrines, the prejudice prongs of each respective standard of review in Michigan's jurisprudence are also the same.

i. *Wiborg v United States* (1896) and *United States v Atkinson* (1936): The genesis of the federal plain-error standard of review under Rule 52(b).

The current federal plain-error standard of review is grounded in Federal Rule of Criminal Procedure 52(b), which provides, "*Plain Error*. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The initial version and adoption of this Rule occurred in 1944, at which time provided, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FR Crim P 52(b) (1944). The 1944 Advisory Committee Notes to

[1] The People provide a summary and a chart of the doctrinal history to be used in reference with the People's analysis. See Appendices 1 and 2.

subsection (b) stated that the Rule "is a restatement of existing law" announced in *Wiborg v United States*, 163 US 632, 658; 16 S Ct 1127; 41 L Ed 289 (1896) ("[I]f a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.").

After the ruling in *Wiborg* and prior to the adoption of Rule 52 in 1944, the United States Supreme Court, in *United States v Atkinson*, 297 US 157; 56 S Ct 391; 80 L Ed 555 (1936), laid the initial groundwork for the Rule's interpretation—past and present. The *Atkinson* Court stated that only "[i]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 160. Thereafter, Rule 52, enacted in 1944, codified the "plain error" doctrine espoused in *Wiborg* and *Atkinson*. The Rule, however, failed to explain its employed language—as it does now—, particularly, what "affecting substantial rights" meant. Thus, it was up to the Supreme Court to interpret the language.

ii. *Kotteakos v United States* (1946): The Supreme Court's first interpretation of "affect substantial rights" within Rule 52.

In *Kotteakos v United States*, 328 US 752, 752; 66 S Ct 1239; 90 L Ed 1557 (1946), the Court engaged in its first interpretation of Rule 52, reviewing, "[W]hether petitioners have suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government admits proved not one conspiracy but some eight or more different ones[?]" The Court reviewed this question under Rule 52(a), the federal "harmless error" rule, which read, "Any error, defect, irregularity or variance which does not affect substantial rights

shall be disregarded." FR Crim P 52(a) (1944).[2] The harmless-error rule contained—and still does—the same "affecting substantial rights" language as Rule 52(b). The Court indicated that the "affect substantial rights" portion of Rule 52 meant "the error had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 757 n 9, 775–76. The Court required appellate courts to consider "what effect the error had or reasonably may be taken to have had upon the jury's decision," *id.* at 764, "[a]nd when the error relates to that minimum [amount of evidence necessary to sustain a conviction] so that, if eliminated, the proof would not be sufficient, necessarily the prejudice is substantial," *id.* at 764 n 18. Since *Kotteakos* involved *non-constitutional* error, the Court placed the burden on the government to prove harmlessness under Rule 52(a)[3] and held that courts must be "sure that the error did not influence the jury, or had but very slight effect." 328 US at 764.[4] As discussed *infra*, the *Kotteakos* standard has evolved further within the plain-error analysis.

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[2] Federal Rule of Criminal Procedure 52(a) (1944) provided, "Any error, defect, irregularity or variance which does not affect substantial rights hall be disregarded." This Rule has not been substantively amended since its adoption. See FR Crim P 52(a).

[3] See *Brecht v Abrahamson*, 507 US 619, 640; 113 S Ct 1710; 123 L Ed 2d 353 (1993) (STEVENS, J., concurring) (*Kotteakos* "places the burden on prosecutors to explain why those [trial] errors were harmless.") This is in contrast to Michigan's harmless-error analysis for preserved, non-constitutional errors under MCL 769.26, where, based on the statutory language, the burden is on the defendant to demonstrate that the error was "more likely than not" or "more probably than not" outcome-determinative, in that it undermined the reliability of the verdict. *People v Lukity*, 460 Mich 484, 495–96; 596 NW2d 607 (1999).

[4] Of important note here is that the United States Supreme Court later held that on direct appeal where the error complained of is of *constitutional* nature, the error can only be considered harmless if the government is able to show that the error "was harmless beyond a reasonable doubt." *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967). Michigan law follows *Chapman*. *People v Anderson (After Remand)*, 446 Mich 392, 404–05; 521 NW2d 538 (1994) ("An error that violates the federal constitution obliges us to look to federal precedent for the harmless error rule."), citing *Chapman*, 386 US 18; *Arizona v Fulminante*, 499 US 279; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

iii. *United States v Agurs* (1976): The Supreme Court employs, for the first time, the "any reasonable likelihood" standard of review as applied to "materiality" under *Brady v Maryland* (1963), and classifies it as a higher burden than that in *Kotteakos*.

The United States Supreme Court then began to extend the "affect substantial rights" doctrine of *Kotteakos*, which subsequently affected the interpretation and application of the plain-error rule itself. In *United States v Agurs*, 427 US 97, 107; 96 S Ct 2392; 49 L Ed 2d 342 (1976), the Court had to determine "whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense and if so, what standard of materiality gives rise to that duty[,]" where "materiality" was determined under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). The Court created a two-tiered framework under *Brady* for determining materiality. When the defense counsel specifically requested evidence, the test was whether the evidence "*might* have affected the outcome of the trial." *Agurs*, 427 US at 104 (emphasis added). Where generally requested evidence or evidence not requested at all was at issue, the Court rejected the rule that "*mere possibility* that an item of undisclosed information *might* have helped the defense. . . *might* have affected the outcome of the trial." *Id.* at 109–10 (emphasis added). The Court, however, believed that "the defendant should not have to satisfy the *severe burden* of demonstrating that newly discovered evidence *probably* would have resulted in acquittal." *Id.* at 111 (emphasis added). The Court noted in a footnote that "[t]his is the standard generally applied by lower courts in evaluating motions for new trial under FR Crim P 33 based on newly discovered evidence." *Id.* at 111 n 19. The Court then rejected the harmless-error standard announced in *Kotteakos*, 328 US at 764, that a judge must be "sure that the error did not influence the jury, or had but very slight effect." *Agurs*, 427 US at 112. In rejecting the *Kotteakos* standard, the *Agurs* Court said, "the constitutional standard of materiality must impose a *higher* burden on the defendant." *Id.* (emphasis added).

The Court settled on the standard for materiality that tasks the defendant to prove "the omitted evidence creates a reasonable doubt that did not otherwise exist" after examination of the entire record. *Id.* The Court said this rule contrasted with the cases regarding the knowing use of perjured testimony by the prosecution that held "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is *any reasonable likelihood* that the false testimony could have affected the judgment of the jury." *Id.* at 103 (footnotes and citations omitted; emphasis added). Justice MARSHALL dissented because he believed that the Court's articulated standard was equivalent to the test already in place for false testimony: "if there is *any reasonable likelihood* that the false testimony could have affected the judgment of the jury." *Id.* at 120 (MARSHALL, J., dissenting) (emphasis added).[5]

iv. *United States v Frady* (1982): The Supreme Court introduces the "miscarriage of justice" concept under the plain-error standard, which is synonymous with *Atkinson*'s rule.

Next, in *United States v Frady*, 456 US 152, 163–66; 102 S Ct 1584; 71 L Ed 2d 816 (1982), the Court strengthened the limits of Rule 52(b). The Court noted that Rule 52(b) grants "courts of appeals the latitude to correct particularly egregious errors on appeal" and "reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." *Id.* at 163. The Court cautioned that "Rule 52(b) is to be used sparingly" because "[t]he intention of [Rule 52(b)] is to serve the ends of justice; therefore it is invoked only in exceptional

[5] As discussed *infra* within this Brief, the United States Supreme Court has since seemingly reclassified the *Kotteakos* standard of review, abrogating *Agurs*'s pronouncement that "any reasonable likelihood" was a higher burden than *Kotteakos*. As cited in footnote 3, *supra*, the prosecution bears the burden in federal courts for certain preserved trial errors under *Kotteakos*, and under *Agurs*, the Court thought a higher burden was necessary, so it shifted the burden to the defendant in the *Brady* context. Thus, perhaps, the *Agurs* burden is higher than *Kotteakos* because the defendant shoulders the burden, rather than the prosecution.

circumstances where necessary to avoid a *miscarriage of justice*." *Id.* (citation and internal quotation marks omitted; emphasis added). The Court subsequently noted that the "miscarriage of justice" standard articulated in *Frady* was synonymous with that from *Atkinson* ("seriously affect the fairness, integrity or public reputation of judicial proceedings"). *United States v Young*, 470 US 1, 15; 105 S Ct 1038; 84 L Ed 2d 1 (1985).

v. *United States v Valenzuela-Bernal* (1982): The Supreme Court extends the "reasonable likelihood" standard of *Agurs* to the Sixth Amendment.

The same year as *Frady*, in *United States v Valenzuela-Bernal*, 458 US 858; 102 S Ct 3440; 73 L Ed 2d 1193 (1982), the Court faced the question about what standard of review applied under the Compulsory Process Clause of the Sixth Amendment to a case where the Government deported two prospective alien defense witnesses. The Court held that a violation of the Compulsory Process Clause of the Sixth Amendment "requires some showing that the evidence lost would be both material and favorable to the defense." *Id.* at 873. Drawing on the materiality standard of, *inter alia*, *Brady* and *Agurs*, the Court held that "sanctions will be warranted for deportation of alien witnesses only if there is *a reasonable likelihood* that the testimony could have affected the judgment of the trier of fact." *Id.* at 872–74 (citation omitted; emphasis added). Accordingly, the Supreme Court appeared to agree with Justice MARSHALL's dissent in *Agurs*, that the *Agurs* Court's holding was equivalent to the requirement that a defendant prove by a "reasonable likelihood" that the evidence was material. *Agurs*, 437 US at 120 (MARSHALL, J., dissenting); see *United States v Bagley*, 473 US 667, 681–82; 105 S Ct 3375; 87 L Ed 2d 481 (1985) (recognizing the "reasonable likelihood" standard as the holding in *Agurs*).

vi. *Strickland v Washington* (1984): The Supreme Court further extends the "reasonable likelihood" standard of *Agurs*, as stated in *Valenzuela-Bernal*, to the context of ineffective assistance of counsel, calling it a "reasonable probability."

Next came *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the seminal case to determine whether counsel was ineffective in criminal cases. The Court set forth a two part test: "First, the defendant must show that counsel's performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. With respect to the interpretation of the prejudice prong, the Court rejected the idea that a defendant need only "show that the errors had *some conceivable effect* on the outcome of the proceeding" because "[v]irtually every act or omission of counsel would meet that test." *Id.* at 693 (citation omitted; emphasis added). "On the other hand, [the Court] believe[d] that a defendant need not show that counsel's deficient conduct *more likely than not* altered the outcome of the case." *Id.* (emphasis added). This is normally recognized as a "preponderance" standard applicable to newly discovered evidence. *Id.* at 694. The *Strickland* Court concluded that "the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, *United States v Agurs*, 427 US at 104, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, *United States v Valenzuela-Bernal*, 458 US at 872–74." 466 US at 694 (citations in original). Accordingly, the Court held that "[t]he defendant must show that there is a *reasonable probability* that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (emphasis added). Stated differently, "[w]hen a defendant challenges a conviction, the question is whether there is a *reasonable probability* that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695 (emphasis added). The Court also

phrased the inquiry as, whether "the defendant has met the burden of showing that the decision reached would *reasonably likely* have been different absent the errors." *Id.* at 696 (emphasis added).

vii. *United States v Bagley* (1985): The Supreme Court applies *Strickland*'s "reasonable probability" standard, adopted from *Agurs*, to a "materiality" case under *Brady*.

Thereafter, the Court employed the *Strickland* "reasonable probability" standard to another "materiality" case in *United States v Bagley*, 473 US 667; 105 S Ct 3375; 87 L Ed 2d 481 (1985). In *Bagley*, the Court was asked to determine "the standard of materiality to be applied in determining where a conviction should be reversed because the prosecutor failed to disclose requested evidence that could have been used to impeach Government witnesses." *Id.* at 699. Relying on the Court's previous standard in *Strickland* and *Agurs*, the majority held:

> We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. [*Id.* at 682 (emphasis added).]

Consequently, the *Bagley* court replaced the *Brady-Agurs* materiality framework with a single materiality standard drawn from *Strickland*—which, in turn, drew from *Agurs*. *Id.* at 679–82. Now, under *Bagley*, evidence is material if there is a "reasonable probability" that it "would" alter the trial result. *Id.* at 682.

viii. *United States v Olano* (1993): The Supreme Court sets forth the current plain-error standard of review under Rule 52(b).

It was in 1993 that the Court finally clarified the plain-error analysis under Rule 52(b), to an extent. In *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993), the

court articulated the following four-prong framework for plain-error review: (1) an error must have occurred, that is "deviation from a legal rule"; (2) the error must be "plain," which is synonymous with "clear," "equivalently," and "obvious"; (3) the plain error must "affect substantial rights," which means the plain error "must have affected the outcome of the district court proceedings"; and (4) if the first three prongs are met, then a court should only reverse if a "miscarriage of justice" would otherwise occur, which means that a defendant is actually innocent or, as stated in *Atkinson*, 297 US at 160, "the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Olano*, 507 US at 732–36. Justice O'CONNOR, writing for the majority, emphasized that "a plain error affecting substantial rights does not, without more, satisfy the *Atkinson* standard, for otherwise the discretion afforded by Rule 52(b) would be illusory." *Id.* at 737. Distinguishing the burden under the third prong, the Court held that for Rule 52(a), harmless-error review, the Government bears the burden of showing the error was harmless beyond a reasonable doubt; however, for Rule 52(b), plain-error review, it is the defendant who bears the burden of persuasion. *Olano*, 507 US at 734. The Court, however, did not discuss the standard by which to measure whether a plain error "affects substantial rights."

For the next decade, the Court continued to apply the four-pronged plain-error analysis of *Olano*, and it continued to emphasize the "reasonable probability" standard of *Strickland* through the materiality requirement of *Brady*. In *Kyles v Whitely*, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995), the Court emphasized that *Brady*'s materiality requirement, as interpreted by *Agurs*, 427 US 97 and *Bagley*, 473 US 667, and which is premised on the prejudice prong of *Strickland*, 466 US 668, did not require a showing by a preponderance, only a "reasonable probability" of a different result based on the evidence. The *Whitley* Court stated:

> *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley*, 473 US at 678. [*Whitely*, 514 US at 434.]

ix. The Supreme Court continued to employ synonymous terms, "reasonable likelihood" and "reasonable probability," within its discussion of the plain-error standard and ineffective-assistance-of-counsel standard, but also muddled the phrasing to some extent.

For the next decade, the Court continued to employ "reasonable likelihood" and "reasonable probability" synonymously, but also began to phrase the standards less precisely. See *Woodford v Visciotti*, 537 US 19, 24; 123 S Ct 357; 154 L Ed 2d 279 (2002) (recognizing that the Court had phrased the "reasonable probability" standard imprecisely on occasions) (citations omitted). In *Strickler v Greene*, 527 US 263; 119 S Ct 1936; 144 L Ed 2d 286 (1999), the Court was again faced with a materiality issue under *Brady*. The Court noted that the lower appellate court had applied the incorrect "more likely than not" standard, where the appropriate standard was "reasonable probability." *Id.* at 289–90. Nevertheless, the Court did not find that petitioner, the defendant, had carried her burden of demonstrating a "reasonable probability" of a different outcome. *Id.* at 296.

The case is not as important for the holding as it is for the dissent. Justice SOUTER filed a concurring and dissenting opinion, and he expressed his view that a "reasonable probability" is equivalent to a "significant possibility." *Id.* at 297 (SOUTER, J., concurring in part and dissenting in part). He further stated:

> I should say something about the standard for identifying it, and about the unfortunate phrasing of the shorthand version in which the standard is customarily couched. The Court speaks in terms of

> the familiar, and perhaps familiarly deceptive, formulation: whether there is a "reasonable probability" of a different outcome if the evidence withheld had been disclosed.
>
> * * *
>
> Despite our repeated explanation of the shorthand formulation in these words, the continued use of the term "probability" raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, "more likely than not." [*Id.* at 297–98.]

Justice SOUTER then discussed *Brady*'s "materiality" evolution. He noted that *Brady* did not define "materiality," rather it was defined first in *Agurs*, 427 US at 103, in the context of the knowing use of perjured testimony by the prosecution, as "any reasonable likelihood" that the evidence affected the verdict. *Strickler*, 527 US at 298 (SOUTER, J., concurring in part and dissenting in part). In addition, in *Agurs*, "we thought a less demanding standard appropriate when the prosecution fails to turn over materials in the absence of a specific request." *Id.* at 299. "[W]e explained it as falling between the more-likely-than-not level and yet another criterion, whether the reviewing court's 'conviction [was] sure that the error did not influence the jury, or had but very slight effect.' " *Id.*, citing *Agurs*, 427 US at 112, quoting *Kotteakos*, 328 US at 764. He then said, "We have treated 'reasonable likelihood' as synonymous with 'reasonable possibility.' " *Strickler*, 527 US at 299 (SOUTER, J., concurring in part and dissenting in part) (citations omitted). Then, he recognized that in *Bagley*, 473 US 667, the Court embraced "reasonable probability" as the appropriate standard to judge the materiality of information withheld by the prosecution whether or not the defense had asked first, and that this standard in *Bagley* is drawn from the prejudice prong of *Strickland*, 466 US at 694. *Strickler*, 527 US at 299 (SOUTER, J., concurring in part and dissenting in part). Finally, he noted, "*Strickland* in turn cited two cases for its formulation, *Agurs* (which did not contain the expression 'reasonable probability') and *United States v Valenzuela–Bernal*, 458 US [at] 873–74 (which held that

sanctions against the Government for deportation of a potential defense witness were appropriate only if there was a 'reasonable likelihood' that the lost testimony 'could have affected the judgment of the trier of fact')." *Strickler*, 527 US at 299–300 (SOUTER, J., concurring in part and dissenting in part). In the end, Justice SOUTER's discussion concluded with the idea that "given the soft edges of all these phrases, the touchstone of the enquiry must remain whether the evidentiary suppression 'undermines our confidence' that the factfinder would have reached the same result." *Id.* at 300–01.

The Court continued to employ these seemingly synonymous terms within its cases. In *Jones v United States*, 527 US 373; 119 S Ct 2090; 144 L Ed 2d 370 (1999), the petitioner, the defendant, was sentenced to death in federal court. His contention on appeal was that the trial court had failed to instruct the jury as to the effect of a deadlock. *Id.* at 375. The Court reviewed the petitioner's claim under Rule 52(b), the plain-error standard. *Id.* at 387–88. Applying the analysis of *Olano*, the Court phased the overall inquiry as, "whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that violates the Constitution." *Id.* at 390 (citations omitted; emphasis added). In concluding that petitioner could not demonstrate reversible error, the Court later phrased the third prong of *Olano* as, "Where the effect of an alleged error is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights." *Id.* at 395.

x. *United States v Dominguez Benitez* (2004) and *United States v Marcus* (2010): The Supreme Court adopts the "reasonable probability" standard from *Strickland* as the standard to determine if a plain error "affects substantial rights" under *Olano* and Rule 52(b).

In 2004, in *United States v Dominguez Benitez*, 542 US 74, 80; 124 S Ct 2333; 159 L Ed 2d 157 (2004), the Court granted certiorari to determine "[w]hether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant

must demonstrate that he would not have pleaded guilty if the violation had not occurred." The petitioner did not preserve his claimed error for appeal, thus the Court reviewed his argument under Rule 52(b). The Court ruled that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a *reasonable probability* that, but for the error, he would not have entered the plea." *Id.* at 83 (emphasis added). To do so, the defendant "must satisfy the judgment of the reviewing court, informed by the entire record, that *the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding*." *Id.* (internal quotation marks omitted; emphasis added), citing *Strickland*, 466 US at 694; *Bagley*, 473 US at 682. *Dominguez Benitez*, 542 US at 83.

In reaching this holding, Justice SOUTER, writing for the majority, relied on past precedent. First, the Court said that "to affect 'substantial rights,'" "an error must have substantial and injurious effect or influence in determining the . . . verdict." *Id.* at 81, citing *Kotteakos*, 328 US at 776. Next, the Court said, "In cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief, we have invoked a standard with similarities to the *Kotteakos* formulation in requiring the showing of 'a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different.' " *Dominguez Benitez*, 542 US at 81, citing *Bagley*, 473 US at 682 (adopting the prejudice standard of *Strickland*, 466 US at 694, for claims under *Brady*, 373 US 83 (internal quotation marks omitted)); *Bagley*, 473 US at 685 (WHITE, J., concurring in part and concurring in judgment) (same). Thus, the Court concluded, "No reason has appeared for treating the phrase "affecting substantial rights" as untethered to a prejudice requirement when applying *Olano* to this

nonstructural error, or for doubting that *Bagley* is a sensible model to follow." *Dominguez Benitez*, 542 US at 82.

Just as important to the Court's explicit pronouncement that the "reasonable probability" standard is the appropriate standard of persuasion under the third prong of *Olano* is Justice SCALIA's concurrence in the case. Justice SCALIA believed that a defendant must show prejudice under the third prong of *Olano* by a preponderance of the evidence. *Id.* at 86 (SCALIA, J., concurring in the judgment) (a defendant "must show that effect to be probable, that is, more likely than not."). Justice SCALIA said, "By my count, this Court has adopted no fewer than four assertedly different standards of probability relating to the assessment of whether the outcome of trial would have been different if error had not occurred, or if omitted evidence had been included." *Id.* After structuring the standards from most to least defendant-friendly, his concurrence *explicitly* noticed that the Court had "extend[ed] our 'reasonable probability' standard to the plain-error context." *Id.*

The Court then applied the plain error's reasonable-probability standard to the trial context in *United States v Marcus*, 560 US 258; 130 S Ct 2159; 176 L Ed 2d 1012 (2010), where the petitioner, the defendant, challenged his jury trial conviction based on an alleged *Ex Post Facto* Clause violation of the United States Constitution. The Court began by finding that the appellate court had applied the incorrect standard from *Olano*. *Id.* at 260. The appellate court had said that it must recognize a plain error if there was *any possibility*, however remote, that the jury convicted the defendant on the erroneous evidence. *Id.* The Supreme Court held that this standard was inconsistent with "this Court's 'pain error' cases." *Id.* Particularly, the appellate court's "standard is inconsistent with the third and fourth criteria" of the plain-error analysis. *Id.* at 262. "The third criterion specifies that a 'plain error' must 'affec[t]' the appellant's

'substantial rights.' In the ordinary case, to meet this standard an error must be 'prejudicial,' which means that there must be a *reasonable probability* that the error affected the outcome of the trial." *Id.* (emphasis added), citing *Olano*, 507 US at 734–35; *Dominguez Benitez*, 542 US at 83. Accordingly, the Court reversed the lower appellate court.

xi. Conclusion: The Supreme Court adopted *Strickland*'s "reasonable probability" analysis as the analysis to be employed under the third prong (the prejudice prong) of *Olano*'s plain-error analysis, making them the same.

From the preceding discussion, it logically follows that the prejudice prong of the plain-error standard is intertwined with and follows from the prejudice prong of the ineffective-assistance-of-counsel standard, and both follow from the "materiality" doctrine under *Brady*. Working backwards from *Marcus*, the most recent case to apply the "reasonable probability" analysis under the plain-error doctrine,[6] one can see that the Court relied on *Dominguez Benitez*. *Dominguez Benitez* espoused that "affect substantial rights," the third prong of *Olano*'s plain error analysis, is measured by a "reasonable probability" that, but for the plain error, a different outcome would result. In formulating the "reasonable probability" analysis, *Dominguez Benitez* relied on *Bagley* (a *Brady* "materiality" case), which held that the touchstone of "materiality" is a "reasonable probability" of a different result. *Bagely*, in turn, adopted its "reasonable probability" analysis from *Strickland*'s prejudice analysis (a "reasonable probability" that but for counsel's error a different outcome would result), and *Dominguez Benitez* also explicitly adopted *Strickland*'s prejudice analysis. *Strickland*, in turn, drew its "reasonable probability" analysis

[6] For purposes of this Brief, *Marcus* is the most relevant recent case to apply the "reasonable probability" analysis, but the most recent United States Supreme Court case applying the "reasonable probability" analysis is *Molina-Martinez v United States*, 578 US ___, ___; 136 S Ct 1338, 1343; 194 L Ed 2d 444 (2015) (a sentencing case), citing *Dominguez Benitez*, 542 US at 76, 82.

from *Venezuela-Bernal* and *Agurs* ("reasonable likelihood" that material evidence would affect the verdict), and *Venezuela-Bernal* drew its own analysis from *Agurs*. See Appendices 1 and 2.

Therefore, the logical conclusion is that the Supreme Court adopted *Strickland*'s "reasonable probability" analysis as the analysis to be employed under the third prong of *Olano*'s plain-error analysis. With respect to plain error, a court asks, "Whether there is a reasonable probability that, but for the error, the outcome of the proceeding would have been different?" Likewise, with respect to ineffective assistance of counsel, a court asks, "Whether there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different?" Consequently, the prejudice prongs of each test are the same, employing identical language.

xii. Michigan jurisprudence has adopted and applied the federal plain-error analysis and ineffective-assistance-of-counsel analysis without alteration. Accordingly, it follows that the third prong, the prejudice prong, of Michigan's plain-error analysis ("affect substantial rights") is the same as the prejudice prong of Michigan's ineffective-assistance-of-counsel analysis ("reasonable probability" of a different outcome).

Michigan's plain-error doctrine and ineffective-assistance-of-counsel doctrine are rooted in the respective federal doctrines, and there is no principled reason to interpret Michigan's doctrines differently from the federal doctrines. Michigan does not have an equivalent rule of criminal procedure to Rule 52 in federal courts. Rather, as noticed in *People v Grant*, 445 Mich 535, 544–45; 520 NW2d 123 (1994), Michigan has three different sources for correcting trial errors: MCL 769.26; MCR 2.613; and MRE 103. In *Grant*, this Court considered what analysis applied to unpreserved, non-constitutional errors. *Id.* at 547–48. This Court turned to the United States Supreme Court's decision in *Olano*, 507 US 725, and adopted *Olano*'s framework as Michigan's doctrine, without alteration, stating that "appellate courts will consider claims of constitutional error for the first time on appeal when the alleged error *could* have been decisive

of the outcome." *Grant*, 445 Mich at 547 (emphasis added). In relation to *Olano*'s third prong, "affect substantial rights," this Court stated, "We believe that the proper interpretation of the term 'prejudice' in the context of issue preservation for plain error may be equated with the longstanding state precedent of outcome determination." *Id.* at 553 (citations omitted).

This Court never defined what was meant by "the longstanding state precedent of outcome determination." *Id.* Instead, it cited cases for the proposition, *id.* (citing cases), but those cases also did not define the outcome-determinative standard. A review of the cases appears to suggest two meanings: a possibility or a probability of a different outcome.[7] The People submit that neither interpretation of "outcome determinative" is correct. As explained *supra*, the federal plain-error doctrine is the basis and body of Michigan's plain-error doctrine. Michigan has not altered the framework of *Olano*, nor has it interpreted it any differently than the federal courts. Most recently, in *People v Smith*, 498 Mich 466, 487 n 15; 870 NW2d 299 (2015), this Court interpreted our plain-error standard and, although finding it was inapplicable to the case, stated,

> As outlined above, (1) an error clearly occurred in this case, (2) that error was "clear and obvious" . . . , and (3) the error clearly affected substantial rights insofar as we find that it had a '*reasonable probability*' of affecting the jury's verdict." Furthermore, an error like this . . . clearly affects 'the fairness, integrity or public reputation of judicial proceedings.' *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), quoting

[7] The cases cited by *Grant*, 445 Mich at 547 are: *People v DeGraffenreid*, 19 Mich App 702, 716; 173 NW2d 317 (1969) ("Where the lawyer's mistake is of such serious proportion that it *may* have been decisive, where but for the lawyer's mistake the defendant *might* not have been convicted, the court *may* . . . grant a new trial.") (Emphasis added); *People v Merchant*, 86 Mich App 355, 358; 272 NW2d 656 (1978) ("Where a defendant raises a constitutional question for the first time on appeal, the Court must determine if the allegedly erroneously admitted evidence was decisive to the outcome of the case."); *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984) ("where an important constitutional question is raised regarding the admissibility of the evidence and is decisive of the outcome of the case"); *People v Bushard*, 444 Mich 384, 439; 508 NW2d 745 (1993) (opinion of BRICKLEY, J.) ("if a constitutional question regarding the admiss[i]bility of evidence is raised, we must determine whether it is decisive of the outcome of the case.").

> *United States v Olano*, 507 US 725, 736; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quotation marks omitted). [Emphasis added].

Given this Court's analysis in *Smith*, this Court should conclude that the prejudice prong of Michigan's plain-error standard is measured by a "reasonable probability," no less (a "possibility") and no more (a "probability"). See Foley & Filiatrault, *The Riddle of Harmless Error in Michigan*, 46 Wayne L Rev 423, 431 (2000) (discussing *Grant*, summarizing *Grant*'s holding with respect to prejudice as "*potentially* outcome determinative") (emphasis added).

While the People are aware that courts, in general, have been imprecise with the wording of the standard, there is no indication that the Michigan courts are intentionally applying their employed language to mean something other than a "reasonable probability." Compare *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003) ("Because the alleged error was not preserved by a contemporaneous objection and a request for a curative instruction, appellate review is for plain (outcome-determinative) error."), with *People v Montgomery*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2016 (Docket 321155), p 4 ("[W]e conclude that the plain error undermines the reliability of the jury's verdict and, therefore, affects defendant's substantial rights), and *People v Hardy*, unpublished opinion per curiam of the Court of Appeals, issued March 19, 2013 (Docket No. 305234), p 6 ("The prosecutor's possible error did not undermine the confidence in the reliability of the verdict, and no outcome determinative plain error occurred."), and *People v Knox*, 256 Mich App 175; 662 NW2d 482 (2003) (holding tainted evidence "not decisive," so no plain error because the prosecutor had a "reasonable likelihood" of convicting without the tainted evidence), rev'd 469 Mich 502; 674 NW2d 366 (2004) (evidence was "decisive").

This phrasing, "outcome determinative," appears to used be synonymously to refer to the *general focus* of a given standard of review that looks to the outcome of any given case in any

given way, rather than an intentional and rigid term anchoring the preponderance standard. See *The Riddle of Harmless Error in Michigan*, 46 Wayne L Rev at 431 ("The focus in the context of plain error therefore appears to be with making sure the right result is reached (outcome determination)"); *Lockhart v Fretwell*, 506 US 364, 370; 113 S Ct 838; 122 L Ed 2d 180 (1993) (phrasing the "reasonable probability" of standard of *Strickland* as "outcome determination") (citations omitted); *Hanna v Plumer*, 380 US 460, 468–69; 85 S Ct 1136; 14 L Ed 2d 8 (1965) ("The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point 'outcome-determinative' in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold [otherwise], the litigation will continue. But in this sense every procedural variation is 'outcome-determinative.' "); *Guaranty Trust Co v York*, 326 US 99, 109; 65 S Ct 1464; 89 L Ed 2079 (1945) ("outcome determination" under the *Erie* doctrine focused on a "significant affect" on the result of litigation).

Even so, it may be incumbent upon this Court to clarify the standard for all Michigan courts to avoid imprecision, just as the United States Supreme Court has admitted to doing on occasion. See *Woodford*, 537 US at 24 (citing cases); *Strickler*, 527 US at 298–300 (SOUTER, J., concurring in part and dissenting in part) (discussing how the word "probability" has been interpreted to mean "more likely than not," but that it is not meant to be so); *Boyde v California*, 494 US 370, 378–80; 110 S Ct 1190; 108 L Ed 2d 316 (1990) ("The legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence is less than clear from our cases.") (citing examples and cases: what a reasonable juror "*could* v *would*" have done; "substantial possibility"; what a reasonable juror "could well have believed").

In *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), this Court considered the analysis to be applied to an unpreserved, constitutional error. This Court held "that the plain error rule discussed in *Olano* and *Grant* extends to unpreserved claims of constitutional error. . . . We reaffirm *Grant*." *Id.* at 764. This Court, however, did not set forth the standard by which to judge prejudice under third prong ("affect substantial rights"). This Court did state that the defendant had failed "to meet his burden of persuasion regarding prejudice" because he failed to show that the court's error *affected the outcome of the trial*. *Id.* at 771–72 (emphasis added). In addition, in a footnote, this Court stated, "In determining prejudice, we review the entire record, including both the jury instructions and the evidence." *Id.* at 772 n 18. This Court's statements in *Carines* mirrored the analysis of *Olano*. Therefore, it is logical to conclude that the current federal interpretation of the plain-error doctrine as explained in *Dominguez Benitez* and *Marcus*, interpreting *Olano*, should be applied in Michigan's plain-error analysis because *Olano* is the foundation stone for Michigan's plain-error doctrine. Michigan jurisprudence has never altered the federal analysis, nor has it rejected the federal analysis. Recently, in *People v Cain*, 498 Mich 108, 116; 869 NW2d 829 (2015), this Court reaffirmed the federal plain-error standard as adopted and applied to Michigan cases. Citing *Puckett v United States*, 556 US 129, 135; 129 S Ct 1423; 173 L Ed 2d 266 (2009).

With respect to a claim of ineffective assistance of counsel in Michigan, this Court adopted, without alteration, *Strickland*'s test and analysis in *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994): "We hold that the intention underlying the Michigan Constitution does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of ineffective assistance of counsel." Accordingly, Michigan's constitutional guarantee of effective assistance of counsel is equivalent to the United States

Constitution's guarantee. Moreover, Michigan courts have not added to nor subtracted from the *Strickland* framework since its adoption, particularly the prejudice prong, a " 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Id.* at 314, quoting *Strickland*, 466 US at 694.

Based on the foregoing analyses, this Court should logically conclude that Michigan's plain-error doctrine and ineffective-assistance-of-counsel doctrine are identical to the respective federal doctrines. Because Michigan's doctrines are identical to the federal doctrines, it follows that the prejudice prong of Michigan's plain-error analysis ("affect substantial rights") is identical to the prejudice prong of Michigan's ineffective-assistance-of-counsel standard (a "reasonable probability" of a different outcome).

b. The People's positions are further supported by federal courts' conclusions that the prejudice prongs of the federal plain-error analysis and ineffective-assistance-of-counsel analysis are the same.

The People's conclusion, that the prejudice prongs of the plain-error standard of review and the ineffective-assistance-of-counsel standard of review are the same, is supported by multiple federal appellate circuit courts' interpretations and applications of the two standards. See, e.g., *Ramirez-Burgos v United States*, 313 F3d 23, 33 (CA 1, 2002) (holding because defendant failed to show prejudice under plain error, he failed to show prejudice under *Strickland*); *Bennett v United States*, 663 F3d 71, 89 (CA 2, 2002) (holding same); *United States v Rangel*, 781 F3d 736, 745–46 (CA 4, 2015) ("affecting substantial rights . . . is similar to *Strickland*'s prejudice inquiry."), citing *Marcus*, 560 US at 262, *Strickland*, 466 US at 694; *United States v Lalonde*, 509 F3d 750, 759 (CA 6, 2007) (federal plain-error review requires a showing of prejudice under the *Strickland* prejudice standard), citing *Dominguez Benitez*, 542

US at 83; *United States v Persfull*, 660 F3d 286, 296 (CA 7, 2011) ("In cases such as this, where there was . . . certainly no plain error, defendants cannot satisfy the prejudice prong of *Strickland*[.]"); *Close v United States*, 679 F3d 714, 721 (CA 8, 2012) (" '[t]he standard for prejudice under *Strickland* is virtually identical to the showing required to establish that a defendant's substantial rights were affected under plain error analysis.' *Becht v United States*, 403 F3d 541, 549 ([CA 8,] 2005), cert denied, 546 US 1177; 126 S Ct 1346; 164 L Ed 2d 59 (2006); accord [] *Dominguez Benitez*, 542 US [at] 83.") (citations in originals; alteration to citations added); *United States v James*, 622 Fed Appx 689, 689, 690 n 1 (CA 9, 2015) (failure to show prejudice under plain error overlaps with prejudice prong of *Strickland*); *Williams v Trammell*, 782 F3d 1184, 1199 n 2 (CA 10, 2015) ("In this context, both inquiries focus on the harm the contested evidence causes when it is stacked up against the other (uncontested) evidence of guilt. It follows that when a substantial-rights standard requires no more than *Strickland*, as is true of the federal plain-error standard, the standards are 'virtually identical.' *Close*, 679 F3d [at] 720–21[]." (Citation in original; alteration to citation added); *Gordon v United States*, 518 F3d 1291, 1300 (CA 11, 2008) ("It is true that the 'substantial rights' standard of plain error review is identical to the 'prejudice' standard of an ineffective assistant claim."); *United States v Hoffman*, __ MJ ___, ___ n 11 (CMA, 2017) (Docket No. Army 20140172), 2017 WL 2812900, at *12 n 11 ("The test for plain error has been analogized as being a restatement of the test for ineffective assistance of counsel.") (Citing cases).

In addition, federal district courts have recognized, "The U.S. Supreme Court has held that *Strickland*'s requirement for prejudice is equivalent to the 'affecting substantial rights' requirement in the plain error context." *United States v Bolar*, unpublished opinion of the Eastern District of Louisiana, issued June 16, 2014 (Docket No. 09-138), 2014 WL 2719362, at *7,

citing *Dominguez Benitez*, 542 US at 83; *Close*, 679 F3d at 720; *Sopko v Smith*, unpublished opinion of the Northern District of Ohio, issued November 13, 2012 (Docket No. 3:10 CV 1943), 2012 WL 5496333, at *12 (holding because petitioner-defendant could not demonstrate plain error at the state appellate court, he cannot establish *Strickland* prejudice in this Court), citing *Becht*, 403 F3d at 549 (CA 8, 2005); *Dominguez Benitez*, 542 US at 83. Most recently, in *United States v Teves*, ___ F3d ___, ___ (Haw DC, 2016) (CR. NO. 11-00503 JMS (03)), 2016 WL 7362866, at *4, the District Court of Hawaii rejected a defendant's claim of ineffective assistance of trial counsel because the defendant failed to show prejudice under the federal plain-error standard. In a footnote, the district court stated, "Several courts have held or suggested . . . that *Strickland*'s prejudice prong is virtually identical to the plain error's substantial rights' prong." *Id.* at *4 n 3, citing *Close*, 679 at 720; *Rangel*, 781 F3d at 745–46; *Bennett*, 663 F3d at 89; *United States v Saro*, 24 F3d 283, 287 (DC Cir, 1994); *Marcus*, 560 US at 262.

Specifically, with respect to Michigan's doctrines, the Sixth Circuit Court of Appeals has recognized that they are substantially similar to the federal doctrines. Hence, Michigan's plain-error and ineffective-assistance-of-counsel prejudice prongs are likewise substantially similar. In *Allen v Harry*, 497 Fed Appx 473 (CA 6, 2012), the petitioner sought a writ of habeas corpus from his Michigan convictions for second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The petitioner appealed his convictions to the Michigan Court of Appeals, raising multiple claims of trial error. *Id.* at 476. One of his claims was that some witnesses were intimidated by police during interviews. *Id.* The Michigan Court of Appeals applied the plain-error standard of *Carines*, 466 US 763–64, and found he "failed to establish how the outcome of

the proceedings was prejudiced by the way the witnesses were treated." *Allen*, 497 Fed Appx at 476 (citation omitted).

After navigating the habeas corpus procedural framework in the Sixth Circuit Court of Appeals, the petitioner argued that his state trial counsel and appellate counsel were ineffective based on the alleged deprivation of a fair trial based on police coerced witness statements. *Id.* at 478. The Sixth Circuit Court of Appeals first determined whether petitioner's claims were procedurally defaulted. *Id.* at 481. To answer that question, the court asked whether petitioner's appellate counsel was ineffective for not raising the claim of ineffective assistance of trial counsel in the state appellate court based on trial counsel's failure to object to the coerced witness statements. *Id.* at 481–82. After discussing *Strickland*'s two-prong standard of review, the federal court held that the Michigan Court of Appeals had decided the evidentiary claim, the coerced witness statements, on the Michigan doctrinal ground of plain error, noting that the Michigan Court of Appeals found "[petitioner] was not denied his substantial rights." *Id.* at 482–83. The Sixth Circuit Court then stated,

> The plain error standard under Michigan law that the state appellate court applied is *similar* to the standard for *Strickland* prejudice. The Michigan Court of Appeals explained that under the plain error rule a defendant must show that the error "affected his substantial rights by prejudicing the outcome of the proceedings." [*People v Allen*, unpublished opinion per curiam of the Court of Appeals, issued November 19, 2002 (Docket No. 233206), at 1], citing *Carines*, [460 Mich at 763–64]. Correspondingly, we agree with the Michigan Court of Appeals and find that prejudice sufficient to support a claim of ineffective assistance of trial counsel cannot be established on this record. [*Allen*, 497 Fed Appx at 482 (emphasis added).]

Hence, the Sixth Circuit Court of Appeals found the third prong of Michigan's plain-error standard, "affect substantial rights," as cited in *Carines*, 460 Mich at 763–64, was sufficiently "similar," to *Strickland*'s prejudice prong, a "reasonable probability" of a different outcome.

Because the petitioner, under the plain-error standard, "failed to establish how the outcome of the proceedings was prejudiced by the way the witnesses were treated," *Allen*, 497 Fed Appx at 482, citing *Allen*, unpub op at 1, the Sixth Circuit Court held that the petitioner would not be able to establish prejudice under *Strickland*'s standard. Accordingly, it follows that Michigan's plain-error prejudice prong is identical to *Strickland*'s prejudice prong.

c. *The People's positions are further supported by other state courts' conclusions that the prejudice prongs of their respective plain-error and ineffective-assistance-of-counsel analyses, which bear substantial similarity to Michigan's doctrines, are the same.*

The People's position is further supported by other state courts' interpretations of the same doctrines within their respective jurisprudence, which are substantially similar, if not identical, to Michigan's doctrines. Ohio Rule of Criminal Procedure 52(B), which is analogous to the Federal Rule of Criminal Procedure 52(b), states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Interpreting Ohio's plain-error rule, the Ohio Supreme Court has stated,

> Crim R 52(B) affords appellate courts discretion to correct "[p]lain errors or defects affecting substantial rights" notwithstanding the accused's failure to meet his obligation to bring those errors to the attention of the trial court. However, the accused bears the burden of proof to demonstrate plain error on the record [ ] and must show "an error, i.e., a deviation from a legal rule" that constitutes "an 'obvious' defect in the trial proceedings," *State v Barnes*, 94 Ohio St 3d 21, 27; 759 NE2d 1240 (2002). However, even if the error is obvious, it must have affected substantial rights, and "[w]e have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." *Id.* The accused is therefore required to demonstrate a *reasonable probability* that the error resulted in prejudice—*the same deferential standard for reviewing ineffective assistance of counsel claims*. *United States v Dominguez Benitez*, 542 US 74, 81–83; 124 S Ct 2333; 159 L Ed 2d 157 (2004) (construing Fed R Crim P 52(b), the federal analog to Crim R 52(B), and also noting that the burden of proving entitlement to relief for plain error "should not be too easy"). [*State*

> *v Rogers*, 143 Ohio St 3d 385, 392; 38 NE3d 860 (2015) (first internal citation omitted; emphasis added).]

Ohio's plain-error rule also requires courts only to reverse "to prevent a manifest miscarriage of justice." *Id.* (citations omitted).

Because Ohio's plain-error rule is premised on the federal rule, similar to Michigan's plain-error doctrine, Ohio interprets its plain-error rule identically to the federal rule. Moreover, Ohio has also adopted the *Strickland* ineffective-assistance-of-counsel test as its own without alterations, just as Michigan has done. *State v Bradley*, 42 Ohio St 3d 136, 141–42; 538 NE2d 373 (1989) (adopting *Strickland*'s test). Accordingly, if a defendant is unable to demonstrate prejudice under Ohio's plain-error standard, which mirrors Michigan's standard, then the defendant is likewise unable to demonstrate prejudice under *Strickland*'s standard premised on the same grounds.

Utah courts also apply an equivalent plain-error rule. Like Michigan, Utah does not have a codified plain-error rule as compared to the federal and Ohio criminal rules of procedure, but does have an equivalent evidentiary plain-error rule, Utah Rule of Evidence 103(a) and (e), similar to Michigan's Rule of Evidence 103(a). Utah also has a Rule of Criminal Procedure 19(e) that provides, "Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice[,]" similar to MCL 769.26 ("miscarriage of justice" rule). Like Michigan's underlying plain-error policy, "The plain error standard of review [in Utah] is also intended to avoid manifest injustice." *State v Munguia*, 253 P3d 1082, 1087; 2011 UT 5 (Utah, 2011). Utah's plain-error rule requires a showing by the defendant that " [1] an error exists; [2] the error should have been obvious to the trial court; and [3] the error is harmful, i.e., absent the error, there is a *reasonable likelihood* of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined."

Id. (emphasis added). With respect to a claim of ineffective of counsel, Utah also adopts, without alteration, the *Strickland* test. *State v Tyler*, 850 P2d 1250, 1253 (Utah, 1993) (Utah Constitution guarantees to counsel are same as those under United States Constitution; adopting and applying *Strickland*). The Utah Supreme Court has explicitly found that "[t]he prejudice analysis *is the same* under both a plain error and ineffective assistance of counsel framework." *Munguia*, 253 P3d at 1087 (internal quotation marks and citation omitted; emphasis added). Hence, where a defendant cannot show a "reasonable likelihood" of a different outcome under the plain-error standard, then he cannot show a "reasonable probability" of a different outcome under the *Strickland* prejudice prong based on the same alleged error.

There are additional state jurisdictions that similarly hold that the prejudice prong of their respective plain-error standards of review—which are equivalent to or substantially similar to the federal plain-error standard—are identical or substantially similar to the prejudice prong of *Strickland*, so that a finding of no prejudice under the plain-error standard precludes a finding of prejudice under *Strickland* on the same grounds. See, e.g., *Lupoe v State*, 300 Ga 233, 243; 794 SE2d 67 (2016) (failure to show probability of different outcome under plain-error standard meant no showing of reasonable probability under *Strickland*); *People v White*, 2011 IL 109689; 353 Ill Dec 517; 956 NE2d 379, 409 (2011) ("Plain-error review under [Illinois's] closely-balanced-evidence prong of plain error is similar to an analysis for ineffective assistance of counsel based on evidentiary error insofar as a defendant in either case must show he was prejudiced: that the evidence is so closely balanced that the alleged error alone would tip the scales of justice against him[.]"); *State v Rhodes*, 657 NW2d 823, 839 n 7 (Minn, 2003) ("Because both the plain error and ineffective assistance of counsel tests require a showing of prejudice, it is redundant to address this claim under plain error."); *State v Parks*, 224 NC App

399 (2012); slip op at 3 (failure to establish prejudice under plain-error meant the defendant was unable to establish the same prejudice under *Strickland* on same underlying basis); *State v Krancki*, 355 Wis 2d 503, 512 n 4; 851 NW2d 824; 2014 WI App 80 (2014) (plain-error standard of review and ineffective-assistance standard of review "essentially involve the same test" with respect to "reasonable probability"); but see *Hernandez v State*, unpublished opinion of the Court of Criminal Appeals of Tennessee, issued December 15, 2011 (Docket No. M2011–00038–CCA–R3–PC), 2011 WL 6382544, at *4 (stating the "more probably than not" plain-error standard under Tennessee law is "essentially the same" as *Strickland*'s prejudice prong) (citations omitted).

> *d. While absence of prejudice under the plain-error analysis equates with an absence of prejudice under the ineffective-assistance-of-counsel analysis where the factual grounds asserted are the same, an overall finding of no plain error does not necessarily preclude, but may preclude a finding of ineffective assistance of counsel.*

Having concluded that the prejudice prong of Michigan's plain-error standard is identical to *Strickland*'s prejudice prong, the next issue is whether a finding of no plain error precludes a finding of ineffective assistance of counsel. The answer is dependent on two primary factors, the underlying basis for the claim of ineffective assistance of counsel and, of course, the entailing fact-specific inquiry.

The plain-error standard and the ineffective-assistance-of-counsel standard each developed for different purposes, but that does not detract from the People's foregoing and proceeding assertions and conclusions. The plain-error standard encourages litigants "to seek a fair and accurate trial the first time around[.]" *Carines*, 460 Mich at 761 (internal quotations marks and citation omitted). The standard focuses on whether the trial court deviated from rules in an egregious way. See *Olano*, 507 US at 732–36. The ineffective-assistance-of-counsel

doctrine guarantees the Sixth Amendment's constitutional right to competent counsel, which is meant to uphold the proper functioning of the adversarial process. Regardless of the focal points of each doctrine, they overlap in three primary respects. First, the burden is always on the defendant under each standard. *Carines*, 460 Mich at 763, citing *Olano*, 507 US at 734 (plain error); *Pickens*, 446 Mich at 302, citing *Strickland*, 466 US at 694 (ineffective assistance). Second, as discussed *supra*, the prejudice prongs of each standard are identical, focusing on the effect the error had on the outcome of the proceeding. Third, each standard of review is a fact-intensive inquiry applied on a case-specific basis, with an ultimate focus "on the fundamental fairness of the proceeding." *Strickland*, 466 US at 696. At this point, it is best to summarize the two standards at play.

Plain Error	**Ineffective Assistance of Counsel**
1) An error occurred; 2) The error was "plain"—i.e., clear or obvious; 3) The error "affected substantial rights"—i.e., there is a reasonable probability that, but for the error, the outcome of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome; 4) Relief is warranted only when the plain error resulted in the conviction of an actually innocent defendant or "seriously affected the fairness, integrity or public reputation of the judicial proceedings." *Carines*, 460 Mich at 763–64; *People v Kowalski*, 489 Mich 488, 505–06; 803 NW2d 200 (2011).	1) Defense counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; 2) There is a reasonable probability that, bur for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Pickens*, 446 Mich 298; *Strickland*, 466 US at 687–95.

This Court has properly recognized that of the two, the plain-error standard "requires the higher showing[.]" *People v Fackelman*, 489 Mich 515, 537 n 16; 802 NW2d 552 (2011). This is because the fourth prong of the plain-error analysis is an exercise in discretion, not a mandate.

Cain, 498 Mich at 118, citing *Olano*, 507 US at 736. The Supreme Court has explained that under the federal plain-error standard, the fourth prong, "seriously affects the fairness, integrity or public reputation of judicial proceedings," is the cornerstone of the analysis because "a plain error affecting substantial rights does not, without more, satisfy the *Atkinson* standard, for otherwise the discretion afforded by Rule 52(b) would be illusory." *Olano*, 507 US at 737. This Court has likewise recognized the same. *Carines*, 460 Mich at 763. The Supreme Court has repeatedly emphasized that "[a]ny unwarranted extension" of the authority of the plain-error rule would "disturb the careful balance it strikes between judicial efficiency and the redress of injustice." *Puckett*, 556 US at 135 (citations omitted). "It is this distinction between automatic and discretionary reversal that gives practical effect to the difference between harmless-error and plain-error review, and also every incentive to the defendant to raise objection at the trial level." *Olano*, 507 US at 744.

Conversely, *Strickland*'s test is not an exercise in discretion. *Strickland* requires a court to grant relief if the defendant meets his burden of showing deficient performance by trial counsel and a reasonable probability that a different result would occur but for the deficient performance. Nevertheless, "*Strickland*'s first prong sets a high bar." *Buck v Davis*, 580 US ___, ___; 137 S Ct 759, 775; 197 L Ed 2d 1 (2017). "[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington v Richter*, 562 US 86, 111; 131 S Ct 770; 178 L Ed 2d 624 (2011). "[S]urmounting *Strickland*'s high bar is never an easy task." *Id.* at 105. Recently, however, the United States Supreme Court has interjected *a suggestion* (intentionally or not) that if a defendant meets *Strickland*'s two-pronged test, a court should not reverse *unless* "fundamental fairness of the proceeding" is jeopardized. *Weaver v Massachusetts*, 582 US ___, ___; ___ S Ct ___; ___ L Ed 2d ___ (2017)

(Docket No. 16-240); slip op at 11 ("the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.' "), quoting *Strickland*, 466 US at 696.[8] This inquiry would be tantamount to the fourth-prong of the plain-error standard. See *Olano*, 507 US at 736–37. Because this inquiry is beyond the scope of this Court's Order with respect to this case, and because the issue is brand new, the People will not go any further in our discussion.

Even with the similarities and differences among the two standards, a finding of no plain error *may*, but does not necessarily, preclude a finding of ineffective assistance of trial counsel. The arguments raised on appeal by a defendant with respect to his ineffective-assistance-of-counsel claim will guide whether or not a finding of no plain error precludes a finding of ineffective assistance. While the prejudice prongs of the plain-error and *Strickland* standards are the same, the remaining prongs of the standards are not equivalent, though they may overlap. Thus, a failure to satisfy one of the three remaining prongs of the plain-error standard may or may not result in a finding of ineffective assistance under *Strickland*.

There are a variety of scenarios that one can think of to illustrate the People's position. The following are just some examples:

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[8] No case law, of which the People are aware, has analyzed this issue. The People assert that if *Strickland* truly permits a trial court discretion to reverse a conviction after a defendant satisfies the two prongs of the test, then this would be equivalent to the fourth prong of *Olano*. It seems more appropriate to assume—but, we do not concede at this point—that this inquiry as to the "fundamental fairness" is subsumed in the second prong of *Strickland* and that it is not a discretionary aspect. See *Weaver*, 582 US at ___; slip op at 15 ("prejudice can be shown by a demonstration of fundamental unfairness"); but see and compare *id.* at ___; slip op at 12 (discussing structural, unpreserved error on collateral review via an claim of ineffective assistance, holding, "the burden is on the defendant to show *either* a reasonable probability of a different outcome . . . *or* . . . to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.") (Emphasis added), with *id.* at __; slip op 2 (THOMAS, J., concurring) ("*Strickland* does *not* hold . . . that a defendant may establish prejudice by a showing that his counsel's errors 'rendered the trial fundamentally unfair.' ") (Emphasis added), and *id.* at ___; slip op at 2 (ALITO, J., concurring in the judgment) (rejecting the petitioner's theory that "error can be prejudicial even if it 'had no effect,' or only 'some conceivable effect,' on the outcome of his trial."), quoting *Strickland*, 466 US at 691, 693.

- Assume a defendant asserts a claim of ineffective assistance of trial counsel on appeal premised on the allegation that trial counsel failed to object to a piece of evidence admitted by the prosecution:

    - If the evidence was *admissible*, regardless of the objection, an argument on appeal under the plain-error standard would be meritless because there was no error (1st prong). Likewise, because the evidence was admissible, trial counsel's failure to object cannot be found deficient under *Strickland* based on prevailing norms. *Lockhart v Fretwell*, 506 US 364, 373; 113 S Ct 838; 122 L Ed 2d 180 (1993).

        - Accordingly, the defendant would fail to meet all prongs of the plain-error standard and each prong of the *Strickland* standard. Thus, he would not obtain relief under either standard.

    - If the evidence was *clearly inadmissible*, the defendant would be able to show error (1st prong) and that is was clear (2nd prong) under the plain-error standard, and we will assume there was a reasonable probability that but for the erroneous evidence the outcome would have been different (3rd prong), but:

        - Assume defense counsel had a proper trial strategy for permitting such evidence; perhaps he believed it would open the door to better evidence for the defendant, or that the evidence also supported his theory of defense, or that the evidence seriously contradicted a prior piece of the prosecution's evidence. Thus, trial counsel's performance was not objectively unreasonable even though his strategy did not work. *Harrington*, 562 US at 89.

            - Accordingly, the defendant would meet prongs 1, 2, and 3 of the plain-error standard (and let's assume he does not meet the fourth), and he would therefore meet the prejudice prong of *Strickland*, which is equivalent to the third-prong of the plain-error standard, but he would not meet the deficiency prong of *Strickland*. Thus, he would not obtain relief under either standard even though both of the prejudice prongs were met.

            - And, if we assume that a court *did* find the fourth prong of the plain-error standard to be met (in addition to prongs 1, 2, and 3), then the defendant would be able to obtain relief under the plain-error standard, but not under the *Strickland* standard—although, a reversal under plain-error would render a *Strickland* claim moot.

        - Now, assume defense counsel had no reasonable trial strategy for admitting the evidence, perhaps he was just neglectful in paying attention. Thus, his performance would meet the deficiency prong of *Strickland*. Then, trial counsel would be found to be deficient under *Strickland*.

- Accordingly, the defendant would meet prongs 1, 2, and 3 of the plain-error standard (and let's assume he does not meet the fourth), and he would meet the prejudice prong of *Strickland*, which is equivalent to the third-prong of the plain-error standard, *and* he would thus meet the deficiency prong of *Strickland*. Thus, he would obtain relief under *Strickland*, but not under the plain-error standard.

Notice that in order to engage in both a plain-error analysis and the *Strickland* analysis, the underlying basis for the *Strickland* claim must also be amenable to a plain-error analysis. Both analyses will not always be necessary where the claim of ineffective assistance of counsel is premised on a separate basis. For example, if the defendant claims that his counsel was ineffective for failing to conduct a pre-trial interview with a particular witness or for failing to relay a plea offer to him, such claims are not amenable to plain-error review because there is no need for the trial court to have issued a ruling on such an issue, which is the focus of the plain-error standard; that is, the ability of a trial court to correct an error at the time it is presented. Thus, the defendant would only be able to seek relief under *Strickland*.

The People acknowledge that in his application Defendant relies on *Ex Parte Taylor*, 10 So3d 1075, 1078 (Ala, 2005), where the Alabama Supreme Court held that a finding of no plain error does not necessarily foreclose a finding of ineffective assistance of counsel. The People agree with the *Taylor* Court's conclusion as shown by the preceding analyses. The Alabama Supreme Court, however, did not focus on the *specific prejudice prong* of the Alabama plain-error rule[9]. In fact, the Alabama Supreme Court does not cite its plain-error standard within its

[9] Alabama's plain-error rule stems from two rules: Alabama Rule of Evidence 103(d) and Alabama Rule of Appellate Procedure 45. Alabama's plain-error standard of review has been interpreted as,

> Plain error is defined in Alabama as error that has "adversely affected the substantial right of the appellant." The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was

opinion. The *Taylor* Court relied on the Missouri Supreme Court's decision in *Deck v State*, 68 SW3d 418, 425 (Mo, 2002), and like the *Taylor* opinion, the *Deck* opinion did not discuss the prejudice prong of Missouri's plain-error rule[10] in relation to the prejudice prong of *Strickland*. Likewise, in *Hagos v People*, 288 P3d 116, 122 (Colo, 2012) (en banc), the Colorado Supreme Court held, "The plain error standard requires that an error impair the reliability of the judgment of conviction to a greater degree than the *Strickland* prejudice standard."[11] The *Hagos* Court, however, referred to the *overall* finding of plain error resulting in "fundamental unfairness" justifying reversal, not the prejudice prong of the plain-error standard when compared with the prejudice prong of *Strickland*, which appears to be similar. See *People v Valdez*, ___ P3d ___, ___; 2014 COA 125 (Mo App, 2014), 2014 WL 4748008, at *3 ("The defendant must show that the error affected a substantial right, and the record must reveal a *reasonable probability* that the error contributed to the defendant's conviction.") (Emphasis added).

> properly raised in the trial court or on appeal. As the United States Supreme Court stated in *United States v Young*, 470 US 1; 105 S Ct 1038; 84 L Ed 2d 1 (1985), the plain-error doctrine applies only if the error is "particularly egregious" and if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." [*Hall v State*, 820 So 2d 113, 121 (Ala Crim App, 1999).]

[10] Missouri Rule of Criminal Procedure 30.20 provides, in pertinent part, "Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Missouri courts review plain error using a two-prong standard, placing the burden is on the defendant: "(1) we determine whether the trial court erred in an 'evident, obvious, and clear' manner; (2) we determine if the error resulted in a manifest injustice or miscarriage of justice." *State v Rucker*, 512 SW3d 63, 66 (Mo App, 2017). But see *State v Washington*, 512 SW2d 118, 125 (Mo App, 2017) ("we will only reverse conviction under plain-error review if there was decisive effect on outcome of trial, meaning that there is *reasonable probability* that, absent evidence, verdict would have been different") (emphasis added).

[11] Colorado defines plain error as, "Plain errors are errors committed by the trial court that are (1) obvious; (2) substantial; and (3) "undermine[ ] the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction." *Hagos*, 288 P3d at 120 (citations and internal quotation marks omitted).

In each of these opinions, the courts looked to the *overall* determination under their respective plain-error standards and each focused on the "miscarriage of justice" or "fundamental fairness" prongs,—which is Michigan's fourth prong—rather than whether "prejudice" existed—which is Michigan's third prong—in comparison to *Strickland*'s prejudice prong. See *Taylor*, 10 So 3d at 1078 ("it may be the rare case that the application of the plain-error *test* [in whole] and the prejudice prong of *Strickland* test will result in different outcomes[.]") (Emphasis and alteration added); *Deck*, 68 Sw3d at 428 ("the two *tests* are not equivalents"). Consequently, the opinions do not and cannot be extended to stand for the proposition that a finding of no prejudice under Michigan's plain-error standard cannot preclude a finding of no prejudice under *Strickland*'s standard, where the underlying bases are the same for each claim, primarily because neither *Taylor*, *Deck*, nor *Hagos* discussed such issues specifically, if at all.

In sum, in Michigan, where an appellate court finds that a defendant has failed to establish plain error, such a finding does not necessarily preclude a finding of ineffective assistance of counsel. Nor does a finding of plain error necessitate a finding of ineffective assistance of counsel. See *United States v Caputo*, 978 F2d 972, 975 (CA 8, 1992) (not every plain error "condemns the lawyer who failed to bring it to the judge's attention of professional incompetence for having failed to notice it. If the plain-error doctrine were so confined it could almost never be invoked successfully, if only because it would be virtually coextensive with the doctrine of ineffective assistance of counsel.") The inquiry is a fact-specific and argument-specific inquiry. That being said, it will likely be the unique case in which the application of the plain-error standard and the *Strickland* standard produce different outcomes. See *Taylor*, 10 So3d 1075, citing *Strickland*, 466 US at 697; *Deck*, 68 SW3d at 428; *Potts v State*, 712 P2d 385, 394 n 11 (Alaska App, 1985). On the other hand, it will always be the case that when a defendant does

establish plain error warranting reversal, the claim of ineffective assistance of counsel becomes moot, and vice-versa.

e. Policy considerations also counsel against interpreting the prejudice prongs of the plain-error and ineffective-assistance-of-counsel standards differently because to interpret one as an imposing a higher burden would encourage non-meritorious litigation.

Policy considerations underscore our foregoing arguments. Plain-error review reflects a "careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." *Frady*, 456 US at 163. The policy intended by *Strickland* is to ensure that a defendant's case has been subjected to adversarial testing as guaranteed by the Sixth Amendment and to prevent "intrusive post-trial inquiry" which would discourage defense counsel from even taking cases if they knew an investigative team would scour the record and collect new evidence to discredit them. *Strickland*, 466 US at 690. Even with different underlying policies, both of these standards share the requirement that a defendant demonstrate that the complained-of error contributed to the conviction, and neither standard is meant to be a substitute for the other.[12]

[12] Most recently, Justice LARSEN, joined by Justice VIVIANO, issued a pertinent concurring opinion in the Order in *People v Parsley*, ___ Mich ___; ___ NW2d ___ (2017) (Docket No. 154734) (LARSEN, J., concurring). Justice LARSEN observed that a defendant who objects in the trial court is worse off than a defendant who fails to object because he is subject to a higher burden on appeal as compared to his counterpart who fails to object and premises his claim on ineffective assistance of counsel. *Id.* at ___; unnumbered order at 1–2. Under MCL 769.26 and *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999), a defendant who objects must show by a preponderance of the evidence that the error more likely that not affected the outcome the trial, whereas his counterpart need only demonstrate a reasonable probability of a different outcome under the ineffective-assistance-of-counsel standard of *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *Parsely*, ___ Mich at ___; unnumbered order at 1–2. Certainly, as Justice LARSEN indicated, this "seems precisely the opposite of the incentive scheme we would expect the law to create." *Id.* at __; unnumbered order at 2.

This Court's Order in the present case *does not* involve the relationship between persevered error and ineffective assistance of counsel among co-defendants, but it is worth noting that Justice

The Supreme Court has recognized that an ineffective-assistance claim can function as a way to escape rule of forfeiture, i.e., plain error, and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 US at 689–90. In *Gordon v United States*, 518 F3d 1291, 1298 (CA 11, 2008), the Eleventh Circuit observed,

> Although it is possible for commission of a single error to amount to ineffective assistance, this circumstance "is clearly the exception and not the rule." *Chatom v White*, 858 F2d 1479, 1485 (CA 11, 1988). To ground a claim of ineffective assistance, a single error " 'must be so substantial as to stamp [counsel's] overall performance with a mark of ineffectiveness.' " *Id.* (quoting *Birt v Montgomery*, 725 F2d 587, 597 (CA 11, 1984) (en banc)).
>
> When a claim of ineffective assistance is based on a failure to object to an error committed by the district court, that underlying error must *at least* satisfy the standard for prejudice that we employ in our review for plain error. Compare *United States v Underwood*, 446 F3d 1340, 1343–44 (CA 11, 2006) (third part of plain error analysis required defendant to establish "a reasonable probability of a different result" at sentencing), with *Gilliam v Sec'y, Dep't of Corr*, 480 F3d 1027, 1033 (CA 11, 2007) (prejudice standard of *Strickland* requires that there be "a

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LARSEN's concurrence further supports the People's position that defendants should not be able to bypass the plain-error standard of review in favor of the, perhaps more friendly, ineffective-assistance-of-counsel standard of review. To do so would continue to encourage litigants to harbor error as means to escape their lawful convictions and would also encourage non-meritorious claims of ineffective assistance of counsel.

The People recognize that it is not in a defense attorney's best interest not to object when such an objection is necessary, and we by no means suggest that defense attorneys will refrain from such objections in order to allow a claim of ineffective assistance of counsel to succeed on appeal. Instead, we are submitting that a Defendant should not have "two bites of the apple" as compared to a defendant who objected at trial. The People do not propose a solution to this problem as it is best left for another case. Nevertheless, we repeat, the underlying policy interests counsel against allowing Defendant's to bypass an evidentiary standard of review in favor of the infective-assistance-of-counsel standard of review, which is why the prejudice prongs of these two standard should be interpreted identically, where a finding on either of the prejudice prongs will necessary include the other when premised on the same basis.

> reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (internal quotation marks omitted)); see also *United States v Nash*, 438 F3d 1302, 1304 (CA 11, 2006). The failure to object to a single error that is either unobvious or non-prejudicial does not "stamp [counsel's] overall performance with a mark of ineffectiveness." *Chatom*, 858 F2d at 1485. *It would be nonsensical if a petitioner, on collateral review, could subject his challenge of an unobjected-to error to a lesser burden by articulating it as a claim of ineffective assistance.* Cf. *United States v Caputo*, 978 F2d 972, 975 (CA 7, 1992) (not every plain error rises to the level of an error that "leaps out at the reader" or "condemns the lawyer who failed to bring it to the judge's attention of professional incompetence"). [Emphasis added].

As the *Gordon* court recognized, interpreting *Strickland*'s prejudice prong as imposing a lesser burden than what the plain-error prejudice prong requires would not encourage meritorious litigation. Rather, it would likely encourage additional (non-meritorious) claims of ineffective assistance of counsel because of the lesser burden. Adopting an interpretation that distinguishes the prejudice prongs of these two standards would be an exercise in judicial ingenuity for no other purpose than to draw a difference that does not and should exist. This Court should avoid such a rule.

f. The Court of Appeals correctly ruled that Defendant failed to meet his burden to demonstrate prejudice under the plain-error standard of review with respect to certain claims, which meant that he failed to demonstrate prejudice under the ineffective-assistance-of-counsel standard of review premised on those claims.

As noted by the Court of Appeals, not all of Defendant's claims were preserved at the trial level. Thus, review of those claims on appeal was for plain error. Defendant also premised his claims of ineffective assistance of counsel on those unpreserved grounds, among other grounds. The Court of Appeals classified the unpreserved (and preserved) claims under three headings: (1) Hearsay; (2) Ammunition and Guns; and (3) Gunshot Residue Test. *People v Randolph*, unpublished opinion per curiam of the Court of Appeals, issued November 24, 2015

(Docket No. 321551) (Appendix 3.) The People will only discuss those unpreserved errors as they pertain to this Court's Order. The Court of Appeals engaged in the appropriate plain-error review of Defendant's claims. After concluding that Defendant failed to establish plain error, the Court of Appeals proceeded to analyze Defendant's claims under the ineffective-assistance-of-counsel standard. The Court of Appeals' analyses are not "clearly erroneous" and did and will "not cause material injustice." MCR 7.305(B)(5)(a).

As to the alleged hearsay, first, there was a statement admitted by the prosecution through Ms. Wilkerson, the victim's boyfriend's sister, that the victim told her Defendant had "been calling all day threaten' [sic] to kill the family, especially Lo and Vontay." *Randolph*, unpub op at 4. Second, the prosecution also asked Ms. Wilkerson, "How was it that Vena said it?", referring to Vena's comments about warning Ms. Wilkerson to call her son Lo. *Id.* Ms. Wilkerson testified, "She said, she's like, well, we better watch out. He said he's goin' get us, we better be on the alert. It was more or less like that type of--we better, we better watch out 'cause he said he's goin' get us, he's goin' kill us, he's goin' kill us." (Tr IIa, 9.) After concluding the record was not clear as to the surrounding circumstances to determine whether the first statement was an excited utterance or whether the second statement was an indication of tone and manner, thus being exceptions to hearsay and non-hearsay, respectively, and thus finding no "plain" error, the Court of Appeals found that *even if* error occurred and was plain, the error did not affect Defendant' substantial rights on review of the entire case because this evidence was indicative of Defendant's premeditation, and he was acquitted of first-degree premeditated murder. *Id*. In addition, Mr. Miller, the victim's boyfriend, properly testified that Defendant called him and Defendant "was threatening and he was goin' do somethin' about [the fight that occurred]." (Tr IIa, 40.) Mr. Miller testified that Defendant "got talkin' real fast and,

you know, when you're angry it gets muffled," so he just hung up the phone. (Tr IIa, 41.) Accordingly, the alleged hearsay evidence was equivalent to the evidence properly admitted through Mr. Miller, and Defendant's substantial rights were not affected after review of the entire case, rather than insolation.

With respect to the alleged inadmissibility of the ammunition and gun, the Court of Appeals found that the record was insufficient to determine Defendant's substantial rights were affected. *Id.* at 6. In fact, the evidence suggested there was no error at all because "the fact that defendant left his belongings behind when he fled and never returned suggested that he abandoned his belongings and thus lack[ed] standing to raise the issue." *Id.* at 5 (citations omitted).

Finally, with respect to the preliminary gunshot residue test, Defendant raised various claims, and the Court of Appeals analyzed each of Defendant's claims in view of the entire record. *Id.* at 6–8. While it did not find plain error, the court nonetheless analyzed whether Defendant had shown any assumed plain errors affected his substantial rights in light of the whole trial record, answering the question in the negative. *Id.* at 8. The appellate court noted that the prosecution did not emphasize the test in their closing argument, only saying, "[I]n the grand scheme of things, it's not something to give a whole lot of weight to, but at the same time, it is a factor." (Tr III, 86–87.) Defendant would rather have this Court focus on the opening statement of the prosecution, in which the prosecutor stated, "Took a--tested his hand, both his hands actually, for gunshot--gunpowder residue. She will tell you the test she did came back positive." (Tr I, 140.) Regardless, it was not a significant fact that the prosecution utilized, and there was other evidence presented linking Defendant to the shooting, which would allow a jury to make a reasonable inference that Defendant was the shooter. *Id.* at 8–9. Defense counsel likewise

"seized upon the facts that the person who actually administered the test was never called as a witness" and that Defendant "was released from custody after the test." *Id.* at 8. Counsel intentionally used the evidence to advance his theory of the case, thus, "error" cannot be found.

With respect to each of the foregoing alleged errors, Defendant raised a claim of ineffective assistance of counsel premised on the same issues. Defendant's claims failed the ineffective-assistance-of-counsel test under *Strickland* because, first, he failed to overcome the high burden of demonstrating that his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. "[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free. ' " *Weaver*, 582 US at ___; slip op at 11 (citation omitted). Defendant's assertions amount to disagreement with the trial counsel's strategy. The Court of Appeals correctly rejected Defendant's contentions because they amounted to second-guessing trial counsel, even if his strategy was not pursued in the most logical or straightforward manner. *Randolph*, unpub op at 10. Trial counsel provided a reasonable basis for his decisions at trial during the *Ginther*[13] hearing, and just because they did not work did not make his performance deficient, and hind-sight is not a permissible tactic to use to analyze such claims on appeal, otherwise all trial counsel will be in trouble.

Nonetheless, the Court of Appeals also engaged in a prejudice analysis under *Strickland*. The Court of Appeals was convinced that, assuming there was deficient performance, there was not a reasonable probability of a different trial outcome based on the alleged errors. *Id.* at 10. Particularly, with respect to the preliminary gunshot residue test, the Court of Appeals appropriately recognized that trial counsel's decision not to call an expert was not prejudicial to

[13] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

his defense. *Id.* Defendant takes issue with the Court of Appeals' analysis that hypothesizes that if trial counsel called an expert that the People would have called our own expert to support our theory—we note, trial counsel testified at the *Ginther* hearing that he wanted to avoid a battle of the experts in this case. (GH I, 53, 69–70; GH II, 38–39.) The People provide another analysis: Defendant's own expert who testified at the *Ginther* hearing *supported the People's theory*, thus, we would use Defendant's own expert, which is why we did not call an expert at the *Ginther* hearing. The expert testified that nitrates are very common in the environment; they are in fertilizer, matches, cured bacon, and gunpowder, (GH I, 13, 22–23), and he further testified that firing a gun could result in a positive result (GH I, 24). As aptly noted by the Court of Appeals, *there was absolutely no evidence that Defendant handled fertilizer, matches, or cured bacon*. *Id.* Common sense and general knowledge must come into play at this point. This murder occurred in Flint, Michigan, an urban area, not the rural countryside.[14] The only evidence at trial was that Defendant had a fight with his girlfriend, had threatened his girlfriend's family after the fight, and that he was found with the gun that matched the bullets pulled from the victim's body and the house and that matched the shell casings on the ground outside of the crime scene. (Tr III, 52–66.) Accordingly, the Court of Appeals correctly found that Defendant had not demonstrated a reasonable probability of a different outcome but for his trial counsel's alleged errors as the

[14] The trial court instructed the jury, on at least four occasions, during closing instructions:

- "And you get to use your own *common sense*. You get to use your own *general knowledge* in the affairs of life." (Tr III, 125 (emphasis added).)
- "Like I said, use your *common sense*, rely on your experience in the affairs of life." (Tr III, 127 (emphasis added).)
- Trust your *common sense* because we do. (Tr III, 127 (emphasis added).)
- In deciding which witnesses you believe, use your *common sense*, *use your everyday experience*. (Tr III, 128 (emphasis added).)

"It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

evidence and reasonable inferences only pointed to Defendant as the murderer. Accordingly, the confidence in the outcome of the trial was not undermined by the alleged errors of counsel based on review of the entire record, considering the properly admitted evidence, defense counsel's trial strategy, and the trial court's instructions to the jury.

Because the Court of Appeals correctly applied the plain-error analysis to the facts of this case, finding, *inter alia*, no prejudice, and because Michigan's prejudice prong of the plain-error analysis is identical to *Strickland*'s prejudice prong, Defendant's failure to satisfy the prejudice prong under plain-error necessarily precludes a finding of prejudice under *Strickland* premised on the same grounds. Nonetheless, to the extent that the Court of Appeals did not rule on the prejudice prong of the plain-error analysis with respect to Defendant's claims, Defendant has still failed to satisfy the *Strickland* standard under the deficiency prong and prejudice prong as the Court of Appeals correctly concluded. Thus, this Court should affirm the convictions because the confidence in them is not undermined and deny leave to appeal.

RELIEF

WHEREFORE, David S. Leyton, Prosecuting Attorney in and for the County of Genesee, by Joseph F. Sawka, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court deny Defendant-Appellant's Application for Leave to Appeal. The Court of Appeals correctly applied the plain-error and *Strickland* analyses. In doing so, a finding of no prejudice under the plain-error standard precluded a finding of prejudice under *Strickland* premised on the same grounds because these prongs are identical. Regardless, the Court of Appeals conducted a thorough analysis of each issue presented. The Court of Appeals correctly analyzed the issues presented. Therefore, the Court of Appeals did not clearly err when reaching its decision, nor has Defendant suffered a material injustice. MCR 7.305(B)(5)(a). While the issues presented in this case are of significant public interest and involve legal principles of major significance, just as any other case before this Court, leave should be denied because our appellate courts correctly apply the plain-error standard of review and ineffective-assistance-of-counsel standard of review, and did so in this case, and their decisions do not demonstrate a misunderstanding or misapplication of the law. MCR 7.305(B)(2) and (3).

Respectfully Submitted,

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/s/ Joseph F. Sawka
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Assistant Prosecuting Attorney
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DATED: August 9, 2017

STATE OF MICHIGAN

IN THE

SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
SAWYER, P.J., K.F. KELLY AND FORT HOOD, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

ANDREW MAURICE RANDOLPH,

Defendant-Appellant.
_____/

Supreme Court
No. 153309

Court of Appeals
No. 321551

Circuit Court
No. 13-033003-FC

APPENDIX

1. Plain-error chronological development Summary.

2. Graphical view of the plain error "prejudice prong" development.

3. *People v Randolph*, unpublished opinion per curiam of the Court of Appeals, issued November 24, 2015 (Docket No. 321551).

APPENDIX 1

Plain-Error Chronological Development Summary

Plain-Error Chronological Development Summary

- 1896 – *Wiborg v United States*, 163 US 632:
  - The Court first recognizes a court's inherent ability to correct unpreserved errors, i.e., "plain errors"
    - "And, although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." *Id.* at 658.

- 1936 – *United States v Atkinson*, 297 US 157:
  - The Court limits the reach of the plain-error rule of *Wiborg*
    - Only "[i]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 160.

- 1944 – Rule 52 of the Federal Rules of Criminal Procedure enacted:
  - 52(a): "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."
  - 52(b): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."
    - Advisory Committee Notes, 1944 Adoption: Note to Subdivision (b). "This rule is a restatement of existing law, *Wiborg v United States*, 16 S Ct 1127, 1197 . . . ."

- 1946 – *Kotteakos v United States*, 328 US 752:
  - Interpreting Rule 52(a), "affect substantial rights" means "the error had substantial an injurious effect or influence in determining the jury's verdict." *Id.* at 757 n 9, 755–76.

- 1976 – *United States v Agurs*, 427 US 97:
  - Employed a two-tiered framework for "materiality" under *Brady v Maryland*, 373 US 83 (1963):
    - When defense counsel specifically requested evidence, the test was:
      - Whether the evidence "*might* have affected the outcome of the trial." *Agurs*, 427 US at 104 (emphasis added).
    - When evidence was generally requested or not requested at all, the test was:
      - Whether "the omitted evidence creates *a reasonable doubt* that did not otherwise exist" after an examination of the whole record. *Id.* at 112 (emphasis added).
        - The Court said this second rule contrasted with the use of false testimony, which was: "if there is *any reasonable likelihood* that the false testimony could have affect the judgment of the jury." *Id.* at 103
          - Justice MARSHALL dissented, saying the second rule was the same as that for false testimony. *Id.* at 120 (MARSHALL, J., dissenting).

- 1982 – *United States v Frady*, 456 US 152:
  - The Court, for the first time, said that rule 52(b) "is to be used sparingly" because "[t]he intention is to serve the ends of justice; therefore it is invoked only in exceptional circumstances where necessary to avoid a miscarriage of justice." *Id.* at 163–66.
    - The "miscarriage of justice" standard is synonymous with that from *Atkinson*, "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v Young*, 470 US 1, 15 (1985).

- 1982 – *United States v Valenzuela-Bernal*, 458 US 858:
  - Relying on *Agurs*, "sanctions will be warranted for deportation of alien witnesses only if there is *a reasonable likelihood* that the testimony could have affected the judgment of the trier of fact." *Id.* at 872–74.

- 1984 – *Strickland v Washington*, 466 US 668:
  - Establishing the two-prong test for ineffective assistance of counsel.
    - Saying that "the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, *United States v Agurs*, 427 US at 104, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, *United States v Valenzuela-Bernal*, 458 US at 872–74." 466 US at 694 (citations in original).
      - Accordingly, the Court held that "[t]he defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

- 1985 – *United States v Bagley*, 473 US 667:
  - Replacing the two-tiered framework *Brady-Agurs* materiality test with a single "reasonable probability" test drawn from *Strickland* premised on *Agurs*.
    - "The evidence is material only if there is a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682.

- 1993 – *United States v Olano*, 507 US 725:
  - The Court set forth the four-prong framework for plain-error review: (1) an error must have occurred, that is "deviation from a legal rule"; (2) the error must be "plain," which is synonymous with "clear," "equivalently," and "obvious"; (3) the plain error must "affect substantial rights," which means the plain error "must have affected the outcome of the district court proceedings"; and (4) if the first three prongs are met, then a court should only reverse if a "miscarriage of justice" would otherwise occur, which means that a defendant is actually innocent or, as stated in *Atkinson*, 297 US at 160, "the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Olano*, 507 US at 732–36.

- 1995 – In *Kyles v Whitely*, 514 US 419:
  - The Court reinforced the understanding that *Brady*'s materiality test comes from *Bagley*, which relied on *Strickland*, which relied on *Agurs*.

- 1999 – *Strickler v Greene*, 527 US 263:
  - Justice SOUTER, dissenting, notes that *Brady*'s materiality test was defined first in *Agurs*, and *Bagley* is the current standard, which is based on *Strickland*, which in turn is based on *Valenzuela–Bernal* and *Agurs*. He said, "We have treated 'reasonable likelihood' as synonymous with 'reasonable possibility'." *Id.* at 299 (SOUTER, J., dissenting) (citations omitted).

- 1999 – *Jones v United States*, 527 US 373:
  - Applying the analysis of *Olano*, the Court phased the overall inquiry as, "whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that violates the Constitution." *Id.* at 390 (citations omitted; emphasis added).

- 2002 – Rule 52 Amended:
  - (a) *Harmless Error*. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
  - (b) *Plain Error*. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

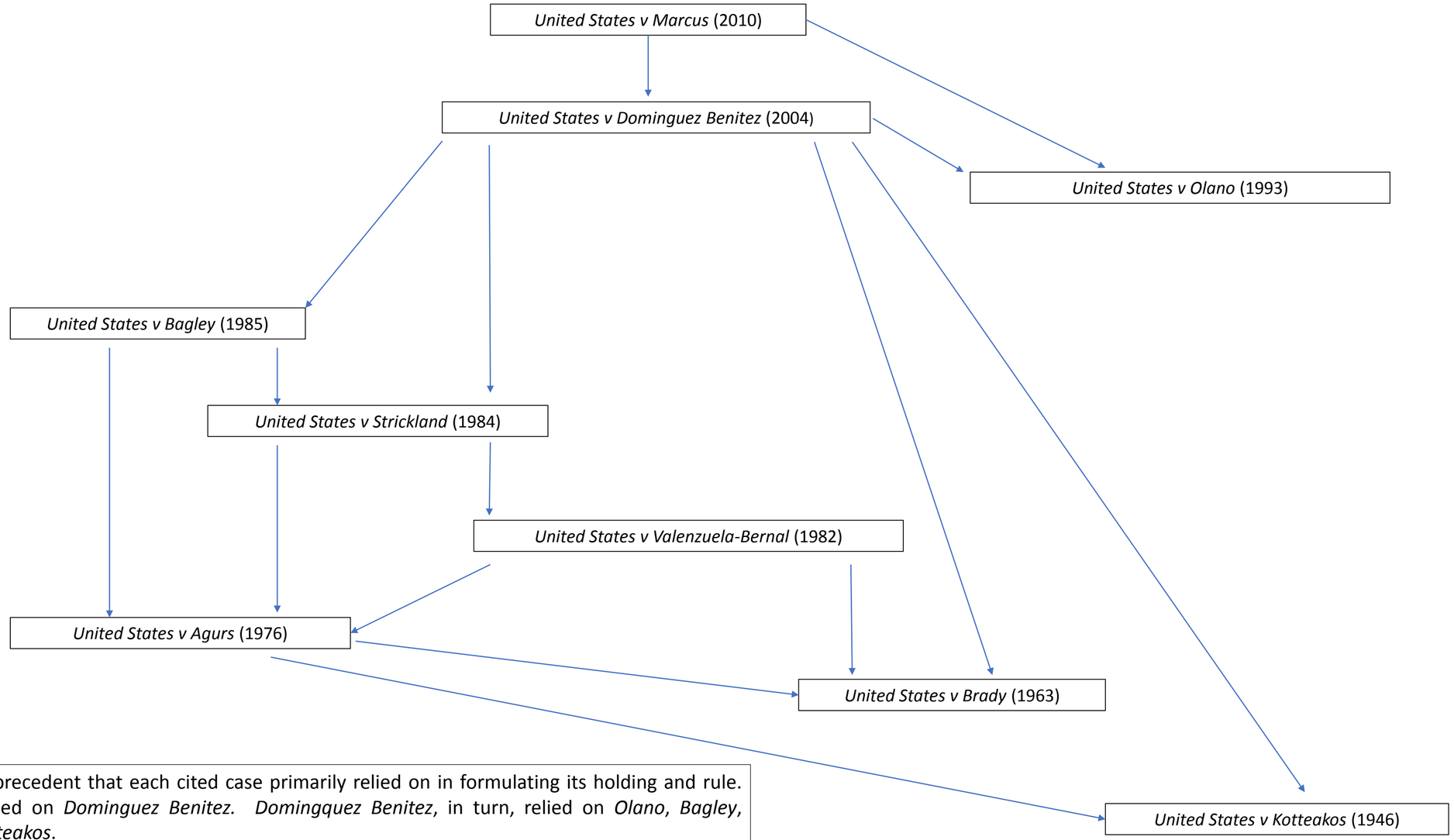
- 2004 – *United States v Dominguez Benitez*, 542 US 74:
  - Justice SOUTER, writing for the majority, ruled that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a *reasonable probability* that, but for the error, he would not have entered the plea." *Id.* at 83 (emphasis added).
    - To do so, the defendant "must satisfy the judgment of the reviewing court, informed by the entire record, that *the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding*." *Id.* (internal quotation marks omitted; emphasis added), citing *Strickland*, 466 US at 694; *Bagley*, 473 US at 682. *Dominguez Benitez*, 542 US at 83.

- 2010 – *United States v Marcus*, 560 US 258:
  - "The third criterion specifies that a 'plain error' must 'affec[t]' the appellant's 'substantial rights.' In the ordinary case, to meet this standard an error must be 'prejudicial,' which means that there must be a *reasonable probability* that the error affected the outcome of the trial." *Id.* (emphasis added), citing *Olano*, 507 US at 734–35; *Dominguez Benitez*, 542 US at 83.

APPENDIX 2

Graphical view of the plain error "prejudice prong" development (beginning with the most recent case)

Graphical view of the plain error "prejudice prong" development (beginning with the most recent case)



This chart illustrates the precedent that each cited case primarily relied on in formulating its holding and rule. For example, *Marcus* relied on *Dominguez Benitez.* *Domingquez Benitez*, in turn, relied on *Olano*, *Bagley*, *Strickland*, *Brady*, and *Kotteakos*.

The take away is that the prejudice prong of plain-error standard of *Olano* developed from *Strickland*'s ineffective-assistance prejudice prong, which in turn developed from *Agurs*'s materiality standard, and *Dominguez Benitez* cites both *Olano* and *Strickland* with respect to the prejudice prong of the plain-error standard.

United States v Atkinson (1936) is intentionally omitted because it focuses on the fourth prong of the plain error analysis, which is not pertinent to the discussion at this point.

APPENDIX 3

People v Randolph, unpublished opinion per curiam of the Michigan Court of Appeals, issued November 24, 2015 (Docket No. 321551).

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 2015
v	No. 321551 Genesee Circuit Court
ANDREW MAURICE RANDOLPH, Defendant-Appellant.	LC No. 13-033003-FC

Before: SAWYER, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, discharging a firearm in a building, MCL 750.234b, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to life in prison for the murder conviction, and concurrent prison terms of 45 to 72 months for the discharge of a firearm conviction and 60 to 90 months for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant was convicted of fatally shooting Vena Fant, the mother of defendant's girlfriend, Kanisha Fant. The evidence showed that several gunshots were fired into the home that Vena shared with her partner, Collin Miller. One bullet struck Vena in the neck and killed her. The shooting occurred after defendant had been fighting with Kanisha all night and she finally called the police. There was evidence that defendant made threats against the family in the hours preceding the shooting. Defendant showed up at the scene while the police were present and was taken into custody. A gunshot residue test performed at the police station was positive. Nevertheless, the police did not have sufficient evidence to charge defendant and he was released. An agent from the Bureau of Alcohol, Tobacco, and Firearms (ATF) became involved and obtained an arrest warrant against defendant for violating a federal law against possession of ammunition by a felon. The murder weapon was found in the house where defendant was arrested. After defendant filed his claim of appeal, this Court remanded for an evidentiary hearing on defendant's claim of ineffective assistance of counsel. The trial court denied defendant's motion for a new trial.

I. SUFFICIENCY OF THE EVIDENCE

Defendant challenges the sufficiency of the evidence as it relates to his conviction of felon in possession of a firearm. A challenge to the sufficiency of the evidence is reviewed de novo on appeal. *People v Cline,* 276 Mich App 634, 642; 741 NW2d 563 (2007). In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman,* 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons,* 210 Mich App 554, 556; 534 NW2d 183 (1995).

The elements of felon in possession of a firearm are (1) the defendant possessed, used, transported, sold, purchased, carried, shipped, received, or distributed a firearm in this state, (2) the defendant was convicted of a felony or a specified felony, and (3) the defendant has not regained eligibility to possess a firearm. MCL 750.224f(1) and (2).

According to the information, defendant had previously been convicted of arson, which is a specified felony. MCL 750.224f(6)(*v*) [now MCL 750.224f(10)(e)]. The elements of the offense as it related to defendant are (1) the defendant possessed or used a firearm in this state, (2) the defendant was convicted of a felony, (3) less than five years had passed since the defendant successfully completed all aspects of his sentence, and (4) the defendant's possessory rights had not been restored. MCL 750.224f(2). The instructions to M Crim JI 11.38a indicate that the jury is not to be instructed on the third and fourth elements unless "the defendant offers some evidence that more than five years has passed since completion of the sentence on the underlying offense and that his or her firearm rights have been restored[.]" Defendant did not do that here, so the only elements were (1) that defendant possessed or used a firearm in this state and (2) he was convicted of a felony.

It is clear that the parties intended to stipulate that defendant was a convicted felon, but failed to actually place the stipulation on the record. However, the ATF agent testified consistent with the apparent intended stipulation, without objection. The agent testified that during his investigation, he discovered "that Andrew Randolph was a convicted felon," which was part of the reason he was able to obtain a warrant for his arrest. Defendant does not challenge the admissibility of that testimony and it constituted sufficient evidence to enable the jury to find beyond a reasonable doubt that defendant was a convicted felon. Therefore, we reject this claim of error.

II. ADMISSION OF EVIDENCE

Only some of defendant's evidentiary claims were preserved with an appropriate objection at trial. MRE 103(a)(1). A preserved issue regarding the admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion occurs when the court selects an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203

(2003). An unpreserved claim of evidentiary error is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004), aff'd 473 Mich 399 (2005). An error is plain if it is "clear or obvious." *Carines*, 460 Mich at 763. An error affects the defendant's substantial rights if it affects the outcome of the case. *Id.*

A. HEARSAY

Defendant challenges the admission of alleged hearsay statements offered by various witnesses concerning threats defendant made against family members on the day of the shooting. Defendant objected to Officer Valencia Jones's testimony regarding Devon Clayburn's statement that defendant had threatened him and his mother. Accordingly, that hearsay claim is preserved. Defendant did not object to the remaining statements that he now challenges on appeal, leaving those claims unpreserved.

1. CLAYBURN'S STATEMENT

Devon Clayburn, the son of defendant's girlfriend, testified at trial that he witnessed the final fight between his mother and defendant. He testified that during the fight, defendant told his mother "to calm down," but did not say anything else. Officer Jones subsequently testified that Clayburn told her "defendant had threatened him and his mother that he would kill them earlier, during an earlier altercation that day." The prosecutor concedes that Clayburn's statement to Jones was inadmissible hearsay. The erroneous admission of evidence is a nonconstitutional error. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001). A preserved nonconstitutional error is presumed to be harmless. The error justifies reversal if it is "more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An error is not outcome determinative unless it undermined the reliability of the verdict in light of the untainted evidence. *Id*. at 495; *Whittaker*, 465 Mich at 427.

We are satisfied that the admission of Clayburn's statement was harmless. Apart from Clayburn's statement, there was evidence that defendant had a history of making threats. Miller in particular testified that defendant bragged about being a killer and had once threatened to "do" Miller. There was also other evidence that defendant had made threats that day. Miller testified that he received a call from defendant, who threatened to do something in response to the fight he had with Vena's daughter and defendant's recorded message containing a threat of some sort was also admitted. That defendant made the threatening phone calls shortly before Vena and Miller's house was fired upon was circumstantial evidence that defendant was the shooter, as was the evidence that the murder weapon was found in the house where defendant was staying. Moreover, Clayburn's hearsay statement was probative of a premeditated intent to kill, *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010), but the jury acquitted defendant of that charge and convicted him only of second-degree murder. In light of the other evidence of defendant's threats that day, and the jury's acquittal of defendant on the first-degree murder charge, it does not appear more probable than not that Clayburn's hearsay statement was outcome determinative.

2. VENA FANT'S STATEMENTS

Linda Wilkerson, Miller's sister, lived with Vena Fant and Miller. She arrived at the home less than an hour before the shooting. Vena was visiting with a friend. After Vena's friend left, Vena told Wilkerson that defendant had "been calling all day threaten' [sic] to kill the family, especially Lo and Vontay." The prosecutor admits that Vena's statement to Wilkerson was hearsay, but the parties dispute whether the evidence was admissible as an excited utterance under MRE 803(2).

To be admissible as an excited utterance, three conditions must be met: (1) the statement arises out of a startling event, (2) the statement is made before there has been time to contrive and misrepresent, and (3) the statement relates to the circumstances of the startling event. *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). The second condition considers whether the declarant "was still under the influence of an overwhelming emotional condition" at the time the statement was made. *Id.* at 425. Thus, a statement may meet the second condition even if it is not made immediately following the startling event. On the other hand, a statement will not meet the second condition if it is made "while under control, even though made contemporaneously" with the event. *Id.* at 424. The focus is on the lack of capacity to fabricate, not the lack of time to fabricate. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998).

A person's receipt of a threat against that person's life or family member can qualify as a startling event. Vena's statement related to that event. While there is some evidence in the record to suggest that Vena was not overcome by the stress or excitement caused by the threat, that issue was not fully explored due to defendant's failure to object. Therefore, we cannot conclude that any error is clear or obvious. Even assuming that a plain error occurred, it did not affect defendant's substantial rights. Similar to Clayburn's statement to Officer Jones, Vena Fant's statement to Wilkerson was evidence that the subsequent shooting was done with a premeditated intent to kill, but defendant was acquitted of first-degree murder and convicted of second-degree murder, which was supported by other evidence unrelated to this hearsay statement.

Wilkerson also testified that after Vena told her about defendant's threats, she was going to call Lo, her son, to warn him, but then hesitated. She said that after "I thought about it, and I thought about Vena the way she said it," she sought Vena's assurance that calling Lo was the right thing to do. The prosecutor interrupted Wilkerson to ask, "How was it that Vena said it?" Wilkerson answered, "She said, she's like, well, we better watch out. He said he's goin' get us, we better be on the alert. It was more or less like that type of – we better, we better watch out 'cause he said he's goin' get us, he's goin' kill us, he's goin' kill us." Defendant contends that this was hearsay and should have been excluded. However, it is unclear whether Wilkerson gave an unresponsive answer by elaborating on what Vena had said, or whether Wilkerson answered the question by using tone and expression to demonstrate the manner in which Vena had related her conversation with defendant. Accordingly, defendant has not shown a plain error with respect to this unpreserved issue.

3. JONES'S TESTIMONY

In the course of her testimony, Jones was asked why she investigated Vena and Miller's answering machine. She replied, "The family had stated that the defendant had left several threatening messages on their answering machine." Defendant contends that this too was hearsay and should have been excluded. We disagree. Viewed in context, it is clear that this testimony was not offered to prove the truth of the matter asserted, i.e., to prove that defendant had left threatening messages, but was offered as part of the foundation for the admission of a threatening message recovered from the answering machine. Thus, the statement was not hearsay, MRE 801(c). Therefore, defendant has not shown a plain error with respect to this unpreserved issue.

B. AMMUNITION AND GUNS

During a lull in the fight with his girlfriend, defendant packed up his clothes in preparation for moving out. During the final altercation, defendant's girlfriend tried to get a phone to call the police. Defendant ran off, leaving his belongings behind, and never returned. In the meantime, the police responded to the scene and called Vena Fant and Miller, who went over to attend to Vena's daughter. Vena and Miller collected defendant's belongings and delivered them to defendant's father, Alphonso Taylor. Officers later went to Taylor's house and obtained his consent to search. Among defendant's belongings, the police found several rounds of .357-caliber ammunition. That ammunition led to the issuance of an arrest warrant on a federal charge and, after defendant was arrested, the murder weapon was discovered.

Defendant raises different challenges to this evidence. First, he contends that Taylor did not have authority to consent to the search of his belongings, and therefore, the ammunition was obtained in violation of his Fourth Amendment rights and should have been suppressed. Defendant further argues that because that search eventually led to the discovery of the murder weapon, that should have been suppressed as well. Because defendant did not challenge the validity of the seizure of this evidence in a motion to suppress in the trial court, or object during trial to the testimony relating to the discovery and seizure of the items, this issue has not been preserved for appeal. *People v Gentner, Inc*, 262 Mich App 363, 368-369; 686 NW2d 752 (2004). Accordingly, our review is limited to plain error affecting defendant's substantial rights. *Carines,* 460 Mich at 763-764.

Because the available record is insufficient to establish a Fourth Amendment violation, defendant has not shown plain error. See *People v Marcus Davis*, 250 Mich App 357, 364; 649 NW2d 94 (2002). While the record presented indicates that Taylor did not have actual authority to consent to a search of defendant's belongings, see *People v Brown,* 279 Mich App 116, 131; 755 NW2d 664 (2008), and did not, in light of his statements to the police, have apparent authority to consent to the search, see, e.g., *United States v Waller*, 426 F3d 838, 845-849 (CA 6, 2005), *United States v Basinski*, 226 F3d 829, 834-835 (CA 7, 2000), and *United States v Fultz*, 146 F3d 1102, 1105-1106 (CA 9, 1998), the fact that defendant left his belongings behind when he fled and never returned suggested that he abandoned his belongings and thus lacks standing to raise this issue. See *People v Henry*, 477 Mich 1123; 730 NW2d 248 (2007), and *People v Taylor*, 253 Mich App 399, 406; 655 NW2d 291 (2002). While it is possible that defendant was responsible for having his things transferred to Taylor, such that he may not have abandoned

them, the available record lacks sufficient information to make that determination. See *Basinski*, 226 F3d at 837-838. Further, even assuming that the ammunition was found as the result of an illegal search, the record does not contain sufficient information to determine whether the gun was likewise subject to suppression. See *People v Jordan*, 187 Mich App 582, 588; 468 NW2d 294 (1991). Accordingly, defendant has not met his burden of establishing a plain error affecting his substantial rights.

Defendant also argues that even if the evidence regarding the ammunition was not subject to suppression, it was inadmissible other-acts evidence under MRE 404(b). We disagree. MRE 404(b)(1) precludes the admission "of crimes, wrongs, or acts 'other' than the 'conduct at issue in the case' that risks an impermissible character-to-conduct inference." *People v Jackson*, 498 Mich 246, 262; 869 NW2d 253 (2015) (Docket No. 149798). For evidence to be admissible under the rule, it must be offered for some other purpose, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material[.]" MRE 404(b)(1). Defendant's possession of ammunition was not evidence of the conduct at issue in this case because it did not directly prove the charged offenses, nor was it inextricably linked to those offenses, given that the ammunition was of a different caliber than that fired by the murder weapon and that recovered at the scene. Thus, it qualifies as other-acts evidence under MRE 404(b)(1). *Jackson*, 498 Mich at 276. While the evidence created "the risk of a character-to-conduct inference," it was not relevant solely for that purpose. Rather, it was logically relevant to a material fact in this case. *Id*. at 277. Evidence that defendant possessed ammunition explained why a federal warrant was issued for his arrest. The fact that defendant was arrested pursuant to a federal arrest warrant on another charge explained why defendant had been arrested again despite the absence of any new evidence against him. Finally, the circumstances of defendant's arrest explained how the murder weapon was located and provided a connection between defendant and that weapon. Although the prosecutor failed to provide notice of its intent to offer the evidence as required by MRE 404(b)(2), it is apparent from the record that defense counsel had notice of the evidence and there has been no showing that defendant was so prejudiced by the error as to warrant reversal. *Jackson*, 498 Mich at 278-279; *People v Dobek*, 274 Mich App 58, 86-87; 732 NW2d 546 (2007).

C. GUNSHOT RESIDUE TEST

Defendant next argues that the trial court erred in admitting evidence regarding the gunshot residue test. This issue has only been partially preserved for appeal because defendant objected to the evidence at trial on limited grounds. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo,* 217 Mich App 393, 398; 551 NW2d 478 (1996). Defendant has preserved only his claims that Officer Jones was not qualified to render an expert opinion, and that Officer Bradley Ross's testimony was based on hearsay. His remaining challenges to Jones's and Ross's testimony are unpreserved.

Defendant first argues that the evidence was not admissible because the dermal nitrate test is unreliable and based on "junk science." The reliability of scientific evidence is a requirement for the admission of testimony by expert witnesses. MRE 702. Under that rule, a trial court may admit expert testimony regarding scientific, technical, or other specialized

knowledge only if it determines, "pursuant to MRE 702, that expert testimony meets that rule's standard of reliability" so as to prevent the introduction of "junk science." *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 782; 685 NW2d 391 (2004). In this case, an expert was not called to offer a scientific opinion regarding the gunshot residue test. Instead, Officers Jones and Ross testified to observing the test being administered, and to seeing the skin residue sample cause a reaction in the chemical test packet. Moreover, considering that there are no published decisions in Michigan precluding such testimony, and that courts from other jurisdictions have reached different results, compare *State v Crowder*, 285 NC 42, 54, 46; 203 SE2d 38 (1974), vacated in part on other grounds 428 US 903; 96 S Ct 3205; 49 L Ed 2d 1207 (1976), with *Brookins v State*, 602 P2d 215, 217 (Okla Crim App, 1979), defendant has not met his burden of demonstrating that the admission of such testimony constitutes plain error.

In a related claim, defendant argues that the evidence was inadmissible under MRE 701 and MRE 702. The crux of defendant's argument is that Jones and Ross could not testify about the test unless they were qualified as experts, and they could not have been qualified as experts because the test was not reliable. The fact remains that the officers were not qualified as experts and, as discussed previously, their testimony about the test is not admissible. A witness's testimony must be based on personal knowledge. MRE 602. Under MRE 701, a lay witness can offer testimony in the form of opinions or inferences if they are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Both officers testified to seeing someone else administer the test and to seeing a chemical reaction. Those were simple facts based on the witnesses' personal knowledge and did not constitute an opinion or inference. Jones further testified that the reaction is an indication of "whether or not a person has gun powder residue on their hands." However, it is not clear whether the inference that defendant had gunpowder residue on his hands was based on Jones's personal knowledge and perceptions, or was based on hearsay.

That brings us to defendant's next claim, which is that the officers' testimony that there was a reaction was based on hearsay, and that the admission of their hearsay testimony violated defendant's right of confrontation. Hearsay is "a statement, other than the one made by the declarant while testifying at the trial . . . , offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible unless the rules of evidence so provide. MRE 802. In addition, the introduction of hearsay evidence that is testimonial in nature violates a defendant's right of confrontation "unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant." *People v Nunley*, 491 Mich 686, 697-698; 821 NW2d 642 (2012).

The fact that there was a reaction was not hearsay. Both officers testified to seeing the reaction themselves. Further, the trial court sustained a hearsay objection to part of Ross's testimony. However, it appears that Officer Jones relied on information from another person in testifying to the significance of the reaction. She testified that she was told that the chemical would turn blue if nitrates were present, and implied that she was told that the reaction is an indication "whether or not a person has gun powder residue on their hands." This arguably constitutes hearsay in that it related to a statement from another person and was offered to prove the truth of the matter asserted, i.e., that a blue reaction means nitrates or gunshot residue are present. It thus appears that Jones's testimony regarding the test result was inadmissible on hearsay grounds, as was Ross's testimony. However, the record does not support a conclusion

that this involved a confrontation issue. As noted, the Confrontation Clause concerns hearsay statements that are testimonial in nature. *Nunley*, 491 Mich at 697-698. A statement is testimonial if its primary purpose is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). In this case, the record does not show who provided the information to Jones or under what circumstances, so we cannot conclude that the statement was testimonial in nature.

Defendant also argues that the evidence was inadmissible under MRE 403, which permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. The fact that evidence is damaging does not mean it constitutes "unfair prejudice" because "'[a]ny relevant testimony will be damaging to some extent." *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983). Evidence offered against a party is "by its very nature . . . prejudicial, otherwise there would be no point in presenting it." *People v Fisher*, 449 Mich 441, 451; 537 NW2d 577 (1995). Rather, "unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Goree,* 132 Mich App 693, 702-703; 349 NW2d 220 (1984). Evidence is unfairly prejudicial if there is a danger that marginally probative evidence will be given undue weight by the jury, *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001), when it would lead the jury to decide the case on an improper basis such as emotion, *People v Meadows,* 175 Mich App 355, 361; 437 NW2d 405 (1989), or when it would be inequitable to allow the use of the evidence, *People v Blackston,* 481 Mich 451, 462; 751 NW2d 408 (2008).

To the extent that the evidence was admissible, it was relevant to defendant's identity as the shooter because it provided a basis for concluding that he had recently fired a gun. The evidence was not unfairly prejudicial because it did not inject a matter extraneous to the issues at trial. Moreover, there was little danger that the jury would give it undue weight because the parties agreed that it was not particularly significant. In his closing argument, the prosecutor indicated that because Jones was not an expert and could not "vouch for the test," "it's not something to give a whole lot of weight to[.]" In the same vein, defense counsel argued that the test was "stupid," it "doesn't hold water," and the presentation of the evidence was a waste of time.

Assuming that the gunshot residue evidence was not admissible for one or more of the reasons advanced by defendant, defendant has not shown either that the evidence affected his substantial rights or that it "is more probable than not that the error was outcome determinative." The gunshot residue evidence appears to have generated more questions than it answered. Defense counsel was successful in eliciting from both Jones and Ross that neither had been trained in administering gunshot residue tests. Both witnesses also testified that the test they observed was only a "preliminary test," and neither had knowledge of any further testing. In his closing argument, defense counsel seized upon the facts that the person who actually administered the test was never called as a witness, that the test that was administered to defendant was only a preliminary test, that defendant was released from custody after the test was performed, and that no further testing was conducted. Indeed, as previously indicated, the prosecutor conceded that this evidence was "not something to give a whole lot of weight to[.]" Moreover, other evidence was presented to link defendant to the shooting. Defendant was angry

over the fight he had with Kanisha and the fact that she had reported the matter to the police. Defendant, who had bragged of being a killer and claimed to own a nine millimeter gun, made threatening phone calls shortly before Vena and Miller's house was shot up by a nine millimeter gun, which was later found in the house where defendant was staying. Accordingly, we conclude that any error arising from the challenged gunshot residue testimony was harmless.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that trial counsel was ineffective, primarily because he did not object to or seek to exclude all of the evidence defendant argues was not admissible. Whether a defendant has been denied effective assistance of counsel is a mixed question of law and fact. The trial court's factual findings are reviewed for clear error, but this Court determines de novo whether the facts properly found by the trial court establish ineffective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The general rule is that effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand),* 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish a claim of ineffective assistance of counsel, defendant must "show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defendant must also show that "the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

The decision whether to seek exclusion of evidence is a matter of trial strategy. Cf. *People v Traylor,* 245 Mich App 460, 463; 628 NW2d 120 (2001) (the decision whether to file pretrial motions is a matter of trial strategy). The failure to object to evidence can constitute ineffective assistance of counsel if the evidence is inadmissible and its introduction is so prejudicial that it could have affected the outcome of the case. *People v Ullah*, 216 Mich App 669, 685-686; 550 NW2d 568 (1996). Counsel's decisions whether to retain and call an expert witness are also matters of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009); *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). The failure to call a witness can constitute ineffective assistance of counsel "if the failure deprives defendant of a substantial defense." *People v Julian,* 171 Mich App 153, 159; 429 NW2d 615 (1988).

Counsel's trial strategy must be sound, and "a court cannot insulate the review of counsel's performance by [simply] calling it trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Therefore, counsel will still be found ineffective despite a strategic decision if the strategy employed was not a sound or reasonable one. *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988). A strategy is sound when it is based on a thorough investigation of the law and facts of a case "developed in concert with an investigation that is adequately supported by reasonable professional judgments." *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). Counsel must make a reasonable investigation of the law and facts of the case or "make a reasonable decision that makes particular investigations unnecessary." *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In this case, defendant has failed to establish plain error in the admission of alleged hearsay statements regarding the threats he made and thus his claim of ineffective assistance of counsel must fail. "[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *People v Fike,* 228 Mich App 178, 182; 577 NW2d 903 (1998). Even if we were to accept defendant's claim that Vena's first statement to Wilkerson was inadmissible hearsay, defendant cannot show that he was prejudiced by counsel's failure to object for the reasons discussed earlier. Similarly, defendant has failed to establish plain error in the admission of the evidence regarding the ammunition, defendant's arrest on the federal warrant, and the guns, and thus his related ineffective assistance of counsel claims must also fail. *Id*.

With respect to the gunshot residue test evidence, defendant seems to argue that counsel was ineffective (1) because evidence of the gunshot residue test result was not admissible and he failed to object to its introduction, or (2) because evidence of the gunshot residue test result was admissible, but counsel did not move to exclude it or present evidence to counter it. We note that counsel did object to the evidence, albeit not on the grounds raised by defendant. Assuming counsel could have prevailed by objecting on another basis, we nevertheless agree with the trial court that it was part of counsel's trial strategy not to exclude the evidence because defendant wanted the jury to know that he had been released despite the positive test result, which indicated that the result was not significant. Although counsel did not pursue this strategy in the most logical and straightforward manner, he nonetheless elicited testimony to support it and argued it to the jury.

To the extent that counsel adopted this strategy primarily because that is what defendant wanted and thus did not investigate whether the residue test evidence could be excluded, that was not objectively reasonable because counsel is not required "to press nonfrivolous points requested by the client" simply because the client wants him to. Rather, it is counsel's obligation to examine the record, research the law, and use his professional judgment to determine the most promising issues and arguments to raise. *Jones v Barnes*, 463 US 745, 751-752; 103 S Ct 3308; 77 L Ed 2d 987 (1983). However, there is no reasonable probability that defendant was prejudiced by any deficiency in this regard.

As discussed previously, it is arguable that Jones's testimony regarding the result of the test was inadmissible hearsay. Thus, had counsel pressed a hearsay objection to Jones's testimony, the prosecutor may have simply called in an expert to testify. Counsel could have then called his own expert witness to discredit the evidence by showing that nitrates are present in substances other than gunpowder, but there was no evidence that defendant had recently handled other substances that contained nitrates from which to infer that something other than gunpowder led to the positive test result. Further, the competing experts could not have said that a positive test result meant that defendant did fire a gun, because the test only detects nitrates, not gunpowder, nor could they have said that the nitrates were or were not from gunpowder. Thus, the evidence would have been suggestive, not conclusive. Finally, even the prosecutor conceded that the test result was not particularly significant and "it's not something to give a whole lot of weight to[.]" Therefore, it is not reasonably probable that seeking to exclude the evidence or presenting an expert to counter it would have been any more successful than the avenue counsel chose.

IV. SANCTIONS

As noted, defendant filed a motion for a new trial in the trial court. In contravention of MCR 2.119(A)(2), defendant's motion and brief exceeded 20 pages. Although defendant sought leave from the court to exceed the 20-page limit, that request was ultimately denied. Defendant then filed an amended brief of 20 pages (which still violated the court rule) and supplemented that brief with his appellate brief, attached as an exhibit. The trial court imposed a fine "as a sanction for filing a non-conforming pleading." While defendant seeks relief from this order, it is not properly before this Court. Although a claim of appeal from a final order "includes all prior interlocutory orders, it does not bring before the reviewing court any subsequent orders." *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193, 197; 452 NW2d 471 (1989) (citations omitted). Thus, this issue is not properly before us.

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood